TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 196.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

L. HILTON-GREEN AND W. A. FINLAY, JR., AS EXECUTORS OF THE ESTATE OF C. L. WIGGINS, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 12, 1916.
CERTIORARI AND RETURN FILED JUNE 5, 1916.

(24,162)

(24,162)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 126.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

L. HILTON-GREEN AND W. A. FINLAY, JR., AS EXECUTORS OF THE ESTATE OF C. L. WIGGINS, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 21, 1915.

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UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on Saturday, the 22nd day of November, A. D. 1913, at New Orleans, Louisiana, before the Honorable Don A. Pardee and the Honorable David D. Shelby, Circuit Judges, and the Honorable William I. Grubb, District Judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
versus
L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased, Defendants in Error.

Be it remembered, that heretofore, to-wit, on the 9th day of July, A. D. 1913, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the United States for the Northern District of Florida, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2532, as follows:

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2532.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
versus
L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased, Defendants in Error.

Error to the District Court of the United States for the Northern District of Florida.

[Original record filed July 9th, 1913.]
U. S. Circuit Court of Appeals. Filed Jul- 26 1913. Frank H. Mortimer, Clerk.

1 In the District Court of the United States for the Northern District of Florida.

L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased, Plaintiffs,

versus

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant.

In the District Court of the United States for the Northern District of Florida, at Pensacola, Fla.

Be it remembered, That on the 4th day of July, A. D. 1910, came the attorney for the defendant, and filed in the office of the Clerk of said Court, a transcript of the record in a certain cause heretofore pending in the Circuit Court of Escambia County, the said transcript being in the words and figures following, to-wit:

Transcript of record and proceedings in the Circuit Court of Escambia County, Florida, in the suit of L. Hilton Green and W. A. Finley, Jr., as executors of the estate of C. L. Wiggins, deceased, against the Mutual Life Insurance Company of New York, a corporation, therein lately pending.

2 On the 21st day of May, 1910, plaintiffs filed their præcipe for summons and respondendum to defendant, in the words and figures as follows:

Præcipe.

In Escambia County Circuit Court, State of Florida.

L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation

Damages, $60,000.00.

The clerk (Judge) will please issue summons ad res. to the defendant(s) returnable to rule day, being the 6th day of June, A. D. 1910

W. A. BLOUNT,
Attorney for Plaintiffs.

May 21, 1910.

The indorsements upon the foregoing præcipe are in the words and figures following: Escambia County Circuit Court. L. Hilton Green and W. A. Finlay, Jr., as Executors of the Estate of C. L. Wiggins, Deceased, vs. Mutual Life Insurance Company of New York, a Corporation. Præcipe. Filed May 21, 1910. Jas. Magibbon, J., Clerk. Blount & Blount & Carter, Attorneys for Plaintiff

On the 21st day of May, 1910, summons ad respondendum issued in the words and figures following:

The State of Florida to all and singular the Sheriffs of the State of Florida:

You are hereby commanded to summons Mutual Life Insurance Company of New York, a corporation, to be and appear before the Judge of our Circuit Court for the First Judicial — of the State of Florida, at the Clerk's Office in Pensacola, on the first Monday of June next, at a Court to be held on that day in and for the County of Escambia, then and there to answer L. Hilton-Green and
3 W. A. Finley, Jr., as executors of the estate of C. L. Wiggins, deceased, in an action of damages. Damages, sixty thousand ($60,000.00) dollars. And have then and there this writ.

Witness, Jas. Macgibbon, Clerk of our said Court, and the seal of said Court, at the court house in Pensacola, county aforesaid, this 21st day of May, A. D. 1910.

[OFFICIAL SEAL.]

JAS. MACGIBBON, *Clerk*,
By THOS. JOHNSON,
Deputy Clerk.
BLOUNT & BLOUNT & CARTER,
Attorneys for Plaintiff.

The indorsements upon the foregoing summons are in the words and figures following: No. —. State of Florida, County of Escambia. In Circuit Court. Execrs. Est. of C. L. Wiggins, Plaintiff, vs. Mutual Life Ins. Co. of N. Y., a Corporation, Defendant. Summons. To June Term, 1910 Filed June 6, 1910. Jas. Macgibbon, Clerk Circuit Court. Blount & Blount & Carter, Plaintiffs' Attorneys.

Received this summons on the 21st day of May, A. D. 1910, and executed the same on the 21st day of May, A. D. 1910, in the County of Escambia, Florida, by delivering to William Blumer, supervisor and business agent of Mutual Life Insurance Company of New York, a corp., in the absence of the president, vice-president, treasurer, secretary, or any other head, defendant, a true copy hereof.

J. C. VAN PELT,
Sheriff of Escambia County,
By THOS. F. CUSACHS,
Deputy Sheriff.

4 On the 6th day of June, 1910, defendant filed its appearance in the words and figures following, to-wit:

In the Circuit Court, First Judicial Circuit, for Escambia County, Florida.

L. HILTON-GREEN and W. A. FINLEY, JR., as Executors of the Estate of C. L. Wiggins, Deceased, Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant.

The Clerk will please enter my appearance for the defendant in the above stated case on the rule day in June, A. D. 1910.

EMMET WILSON,
Attorney for Defendant.

The indorsements on the foregoing appearance are in the words and figures following, to-wit: In Circuit Court, Escambia Co., Fla. L. Hilton-Green & W. A. Finlay, as Executors, Plaintiffs, vs. The Mutual Life Ins. Co., Deft. Appearance. Filed June 6, 1910. Jas. Macgibbon, Clerk Circuit Court. Emmet Wilson, Atty. for Deft.

On the 6th day of June, 1910, plaintiffs filed their declaration in the words and figures as follows:

In Escambia County Circuit Court, State of Florida.

L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of the Estate of Cilbey L. Wiggins, Deceased, Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant.

The plaintiffs sue the defendant:

1. Because on the 16th day of December, 1908, the defendant, by its written policy of insurance numbered 1,765,206, promised and agreed with one Cilbey L. Wiggins that in consideration of the annual premium of six hundred and twenty-six and 90/100 ($626.90) dollars then paid by him to it, and of the other considerations mentioned in said policy, it would, upon receipt at its home office in the City of New York, of due proof of the death of said Cilbey L. Wiggins, pay the sum of seven thousand six hundred and sixty-two ($7,662.00) dollars, less any indebtedness due upon said policy to the company and any unpaid portion of the premium for the then current policy-year to his executors, administrators or assigns, unless he, the said Cilbey L. Wiggins, should designate a new beneficiary to whom the said payment should be made. A copy of the said policy is hereto attached, marked Exhibit "A," and prayed to be made a part hereof.

That the said Cilbey L. Wiggins died on the 26th day of March

A. D. 1910, and at the time of his death he had paid all premiums due upon the said policy, and that it was then still in force and effect; and that he had not prior to his death changed the beneficiary to whom the sum due upon the said policy should be paid.

That the said Cilbey L. Wiggins left a will, in which he nominated the plaintiffs as his executors, and that the said will has been duly probated in the Court of the County Judges of Escambia County, Florida, and that letters testamentary have been issued by the said County Judge to the plaintiffs and they have been duly qualified and are acting as the executors of the estate of him, the said Cilbey L. Wiggins.

That the plaintiffs have filed with the defendant, at its home office in the City of New York, and defendant has received at its said home office due proof of the death of the said Cilbey L. Wiggins, but that the defendant has denied any liability upon the said policy and refuses to pay the sum thereby promised to be paid, or any part thereof, to the plaintiffs.

That the said Cilbey L. Wiggins before his death did and performed, and the plaintiffs have since his death done and performed, each and every act required to be done and performed by him or them as a condition precedent to the accruing of the liability of the defendant upon the said policy and of its duty to pay to the plaintiffs the sum of money promised to be paid thereby, and that the liability and duty to pay the said sum have accrued before the beginning of this suit. But that the defendant has refused to pay
6 the said sum or any part thereof, although the payment thereof has been often demanded; to the damage of the plaintiffs of fifteen thousand ($15,000.00) dollars.

Whereupon, the plaintiffs sue to recover the said sum of $15,000.00, and a reasonable attorney's fees, to be fixed in accordance with the statutes of the State of Florida, in such case made and provided.

2. Because on the 16th day of December, 1908, the defendant by its written policy of insurance numbered 1,765,204, promised and agreed with one Cilbey L. Wiggins, that in consideration of the annual premium of six hundred and twenty-six and 90/100 ($626.90) dollars then paid by him to it, and of the other considerations mentioned in said policy, it would upon receipt at its home office in the City of New York of due proof of the death of the said Cilbey L. Wiggins, pay the sum of seven thousand six hundred and sixty-two ($7,662.00) dollars, less any indebtedness due upon the said policy to the company, and any unpaid portion of the premium for the then current policy-year to his executors, administrators, or assigns, unless he, the said Cilbey L. Wiggins, should designate a new beneficiary to whom the said payment should be made. A copy of the said policy is hereto attached, marked Exhibit "B," and prayed to be made a part hereof.

That the said Cilbey L. Wiggins died on the 26th day of March, A. D. 1910, and at the time of his death he had paid all premiums due upon the said policy, and that it was then still in force

and of effect and that he did not, prior to his death, change the beneficiary to whom the sum due upon the said policy should be paid.

That the said Cilbey L. Wiggins left a will, in which he nominated the plaintiffs as his executors, and that the said will has been duly probated in the Court of the County Judge of Escambia County, Florida, and that letters testamentary have been issued by the said County Judge to the plaintiffs, and they have been duly qualified and are acting as executors of the estate of him, the said Cilbey L. Wiggins.

That the plaintiffs have filed with the defendant at its home office in the City of New York, and defendant has received at its said home office, due proof of the death of the said Cilbey L. Wiggins,
7 but that the defendant has denied any liability upon the said policy and refuses to pay the sum thereby promised to be paid, or any part thereof, to the plaintiffs.

That the said Cilbey L. Wiggins before his death did and performed, and the plaintiffs have since his death done and performed, each and every act required to be done and performed by him or them, as a condition precedent to the accruing of the liability of the defendant upon the said policy and of its duty to pay to the plaintiffs the sum of money promised to be paid thereby, and that the liability and duty to pay the said sum have accrued before the beginning of this suit. But that the defendant has refused to pay the said sum or any part thereof, although payment thereof has been often demanded; to the damage of the plaintiffs of fifteen thousand ($15,000) dollars.

Whereupon, the plaintiff sues to recover the said sum of $15,000.00 and a reasonable attorney's fee, to be fixed in accordance with the statutes of the State of Florida, in such case made and provided.

3. Because on the 16th day of December, 1908, the defendant by its written policy of insurance, numbered 1,765,210, promised and agreed with one Cilbey L. Wiggins that, in consideration of the annual premium of six hundred and twenty-six and 90/100 ($626.90) dollars, then paid by him to it, and of the other considerations mentioned in the said policy, it would upon receipt at its home office in the City of New York of due proof of the death of the said Cilbey L. Wiggins, pay the sum of seven thousand six hundred and sixty-two ($7,662.00) dollars, less any indebtedness due upon said policy to the company and any unpaid portion of the premium for the then current policy-year, to his executors, administrators or assigns, unless he, the said Cilbey L. Wiggins, should designate a new beneficiary to whom the said payment should be made. A copy of the said policy is hereto attached, marked Exhibit "C," and prayed to be made a part hereof.

That the said Cilbey L. Wiggins died on the 26th day of March, A. D. 1910, and at the time of his death he had paid all premiums
8 due upon the said policy, and that it was then still in force and of effect, and that he did not, prior to his death, change the beneficiary to whom the sum due upon the said policy should be *made*.

That the said Cilbey L. Wiggins left a will in which he nominated

the plaintiffs as his executors, and that the said will has been duly probated in the Court of the County Judge of Escambia County, Florida, and that letters testamentary have been issued by the said County Judge to the plaintiffs, and they have been duly qualified and are acting as the executors of the estate of him, the said Cilbey L. Wiggins.

That the plaintiffs have filed with the defendant at its home office in the City of New York, and the defendant has received at its said home office, due proof of the death of the said Cilbey L. Wiggins, but that the defendant has denied any liability upon the said policy and refuses to pay the sum thereby promised to be paid, or any part thereof, to the plaintiffs.

That the said Cilbey L. Wiggins before his death did and performed, and the plaintiffs have since his death done and performed, each and every act required to be done and performed by him or them, as a condition precedent to the accruing of the liability of the defendant upon the said policy and of its duty to pay to the plaintiffs the sum of money promised to be paid thereby, and that the liability and duty to pay the said sum have accrued before the beginning of this suit. But that the defendant has refused to pay the said sum or any part thereof, although the payment thereof has been often demanded; to the damage of the plaintiffs of fifteen thousand ($15,000.00) dollars.

Whereupon the plaintiff sues to recover the said sum of $15,000.00 and a reasonable attorney's fee, to be fixed in accordance with the statutes of the State of Florida in such case made and provided.

4. Because on the 16th day of December, 1908, the defendant by its written policy of insurance numbered 1,765,208, promised and agreed with one Cilbey L. Wiggins, that in consideration of the said annual premium of six hundred and twenty-six and 90/100 ($626.90) dollars then paid by him to it and of the other considerations mentioned in said policy, it would, upon receipt at its home office in the City of New York of due proof of the death of the said Cilbey L. Wiggins, pay the sum of seven thousand six hun-
9 dred and sixty-two ($6,662.00) dollars, less any indebtedness due upon said policy to the company and any unpaid portion of the premium for the then current policy-year to his executors, administrators or assigns, unless he, the said Cilbey L. Wiggins, should designate a new beneficiary to whom the said payments should be made. A copy of the said policy is hereto attached, marked Exhibit "D," and prayed to be made a part hereof.

That the said Cilbey L. Wiggins died on the 26th day of March, A. D. 1910, and at the time of his death he had paid all premiums due upon the said policy, and that it was then still in force and effect, and that he did not, prior to his death, change the beneficiary to whom the amount due upon the said policy should be paid.

That the said Cilbey L. Wiggins left a will in which he nominated the plaintiffs as his executors, and that the said will has been duly probated in the Court of the County Judge of Escambia County, Florida, and that letters testamentary have been issued by the said County Judge to the plaintiffs, and they have been duly qualified

and are acting as the executors of the estate of him, the said Cilbey L. Wiggins.

That the plaintiffs have filed with the defendant at its home office in the City of New York, and defendant has received at its said home office, due proof of the death of the said Cilbey L. Wiggins, but the defendant has denied any liability upon the said policy, and refuses to pay the sum thereby promised to be paid, or any part thereof to the plaintiffs.

That the said Cilbey L. Wiggins before his death did and performed, and the plaintiffs have since his death done and performed, each and every act required to be done and performed by him or them as a condition precedent to the accruing of the liability of the defendant upon the said policy, and of its duty to pay to the plaintiff the sum of money promised to be paid thereby, and that the liability and duty to pay the said sum has accrued before the beginning of this suit. But that the defendant has refused to pay the said sum or any part thereof, although the payment thereof has been often demanded—to the damage of the plaintiff of fifteen thousand ($15,000.00) dollars.

Whereupon, the plaintiffs sue to recover the said sum of $15,000.00 and a reasonable attorney's fee, to be fixed in accordance with the statutes of the State of Florida, in such case made and provided.

BLOUNT & BLOUNT & CARTER,
Attorneys for Plaintiffs.

EXHIBIT "A."

Ordinary Life.

The Mutual Life Insurance Company of New York.

Number 1765206. Amount $7662. Age 61.

Annual Premium $626.90.

In consideration of the — annual premium of six hundred twenty-six and 90/100 dollars (the receipt of which is hereby acknowledged), and of the payment of a like amount upon each sixteenth day of December hereafter until the death of the insured, promises to pay at the home office of the company in the City of New York upon receipt at said home office of due proof of the death of Cilbey L. Wiggins, of Pine Barren, County of Escambia, State of Florida, herein called the insured, seventy-six hundred and sixty-two dollars, less any indebtedness hereon to the company, and any unpaid portion of the premium for the then current policy-year, upon surrender of this policy properly receipted, to his executors, administrators or assigns the beneficiaries, with the right of revocation.

Change of Beneficiary.—When the right of revocation has been reserved, or in case of the death of any beneficiary under either a

revocable or irrevocable designation, the insured, if there be no existing assignment of the policy made as herein provided, may, while the policy is in force, designate a new beneficiary with or without reserving right of revocation by filing a written notice thereof at the home office of the company, accompanied by the policy, for suitable indorsement thereon. Such change shall take effect upon the indorsement of the name on the policy by the company. If any beneficiary shall die before the insured the interest of such beneficiary shall vest in the insured.

11 Payment of Premiums:—The company will accept payment of premiums at other times than as stated above, as follows:

$326.00 semi-annually on each sixteenth day of December and June or $166.10 quarter-annually on each sixteenth day of December, March, June and September, provided such change is made on any anniversary of the date of this policy.

Except as herein provided the payment of a premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable.

All premiums are payable in advance at said home office or to any agent of the company, upon delivery, on or before date due, of a receipt signed by an executive office (president, vice-president, second vice-president, secretary or treasurer) of the company and countersigned by said agent.

A grace of thirty days (or one month if greater) subject to an interest charge at the rate of five per centum per annum, shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If death occur within the period of grace the unpaid portion of the premium for the then current policy-year shall be deducted from the amount payable hereunder.

Conditions.

Residence and Travel.—This policy is free from any restriction as to residence and travel.

Occupation.—This policy is free from any restriction as to military or naval services, and, as to other occupations of the insured, it is free from any restriction after one year from its date, as set forth in the provisions of the application indorsed hereon or attached hereto.

Suicide.—The company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the issurance of this policy, as set forth in the provisions of the application indorsed hereon or attached hereto.

Incontestability.—This policy shall be incontestable except for nonpayment of premiums, provided two years shall have elapsed from its date.

12 This policy and the application herefor, copy of which is indorsed hereon or attached hereto, constitutes the entire

contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the insured shall avoid or be used in defense to a claim under this policy unless contained in the written application herefor, a copy of which is indorsed hereon or attached hereto.

If the age of the insured has been misstated the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Participation.—The proportion of the surplus accruing upon this policy shall be ascertained and distributed annually and not otherwise.

Amount of insurance payable at death.	Premiums payable during life.	Annual dividend period.

Dividends.—Dividends at the option of the insured or the owner of this policy shall on the 16th day of December of each year be either——

(1) Paid in cash; or,

(2) Applied toward the payment of any premium or premiums; or,

(3) Applied to the purchase of paid up additions to the policy; or,

(4) Left to accumulate to the credit of the policy with interest at the rate of three per centum per annum and payable at the maturity of the policy, but withdrawable on any anniversary of the policy.

Unless the insured or the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of paid-up additions as per option (3). Such paid-up additions may be surrendered at any time for a cash value which shall not be less than the original cash dividends as per option (1).

Loans.—At any time after three full years' premiums have been paid, and while this policy is in force the company will advance, on the execution of a proper loan agreement and on proper
13 assignment and delivery of this policy and on the sole security hereof an amount which with interest hereon to the end of the current policy-year shall be equal to or at the option of the owner less than the cash value at the end of said year; any existing loan hereon with accrued interest, and any equal portion of said current policy-year's premiums shall be paid out of such advance. Interest on the loan will be at the rate of five per centum per annum, payable at the end of each policy-year, and this interest if not paid annually shall be added to the existing loan, and shall bear interest at the same rate. Failure to repay any such advance or to pay interest shall not avoid this policy unless the total indebtedness hereon to the company shall equal or exceed the cash

value at the time of such failure, or until one month after notice shall have been mailed by the company to the last known address of the insured and of the assignees of record, if any, at the home office of the company.

Assignment.—No assignment of this policy shall be binding upon the company, unless it be filed with the company at its home office. The company assumes no responsibility as to the validity of any assignment.

Options on Surrender or Lapse.—After this policy shall have been in force three full years, the owner within three months after any default in payment of premium, but not later, may elect either—

(*a*) To surrender this policy for its cash value less any indebtedness to the company hereon (this balance is hereinafter referred to as the net cash value); or,

(*b*) To have the insurance continue in force as term insurance from the date of such default, without further participation and without the right to loan or cash value, for an amount equal to the face amount of this policy and any outstanding dividend additions less any indebtedness to the company hereon; or,

(*c*) To purchase non-participating paid-up life insurance payable at the same time and on the same conditions as this policy.

The cash value under option (*a*), after premiums have been paid for three full years or more, will be the reserve at the date of default for the face amount of this policy and for any dividend additions hereto, computed according to the American Experience Table of Mortality assuming interest at the rate of three per centum per annum, less a surrender charge at the following rate per thousand dollars insured by the face amount of this policy, to-wit: If three full years' premiums have been paid, fifteen dollars; if four full years' premiums have been paid, twelve and a half dollars; if five full years' premiums have been paid, ten dollars; if six full years' premiums have been paid, ten dollars; if seven full years' premiums have been paid, seven and a half dollars; if eight full years' premiums have been paid, five dollars; if *eight* full years' premiums have been paid, two and a half dollars; provided, however, that in no case shall such surrender charge be more than one-fifth of the reesrve on the above basis for the face amount insured by this policy, and further provided that after premiums have been paid for ten full years or more there shall be no surrender charge.

The term for which the insurance will be continued under option (*b*) or the amount of the paid-up life insurance obtainable under option (*c*), will be such as the net cash value obtainable under option (*a*) will purchase at the attained age of the insured at date of default when applied as a net single premium according to the American Experience Table of Mortality assuming interest at the rate of three per centum per annum. If the insured shall not within three months after default in payment of premium surrender this policy to the company at the home office for its cash value as provided in option (*a*) or for paid-up insurance as provided in option (*c*), the insurance will be continued as provided in option (*b*).

Table of Loan and Surrender Values.

The values in the following table are computed in accordance with the above provisions and upon the assumption that premiums have been paid in full for the number of years the "policy has been in force." If there be any indebtedness to the company on the policy, or if there be any outstanding dividend additions, the values will be modified as hereinbefore provided.

The cash and loan values and the paid-up life insurance stated in the following table apply to a policy for $1,000.00. As this policy is for $7,662, the cash, loan, or paid-up life insurance available at the end of any policy-year will be 7 & 662/1000 times the amount stated in the table for that year.

15 The period of paid-up continued insurance remains the same for a policy of any amount.

After policy has been in force.	Column 1. Cash value. Loan value.	Column 2. Paid-up non-participating life insurance.	Column 3. Paid-up non-participating continued (term) insurance for		
			Years.	Months.	Days.
3	$90	$127	2	5	0
4	127	176	3	9	0
5	164	223	3	9	0
6	198	266	4	2	0
7	234	309	4	7	0
8	269	351	4	11	0
9	303	391	5	2	0
10	337	429	5	4	0
11	368	462	5	6	0
12	398	493	5	7	0
13	427	523	5	7	0
14	456	552	5	8	0
15	484	580	5	7	0
16	512	607	5	7	0
17	539	633	5	6	0
18	566	653	5	4	0
19	593	682	5	3	0
20	619	705	5	1	0
21	644	727	4	11	0
22	669	749	4	8	0
23	694	770	4	6	0
24	718	790	4	3	0
25 Years	743	810	3	11	0

Values for later years will be compured [computed] upon the above stated basis and will be furnished upon request.

The cash value provided for in the above table for the end of a policy-year, less interest thereon at the rate of five per centum per

annum to the end of such policy-years, can be obtained during such policy-year, provided all premiums due prior to the end of such policy-year shall have been duly paid.

16 The loan values provided for in the above table for the end of the policy years can be obtained (less interest) during such policy-years as explained in the above cause entitled "Loans."

Reinstatement.—Unless it shall have been surrendered for its cash value, this policy may be reinstated at any time within three years from date of default of payment of any premium, upon evidence of insurability, satisfactory to the company and upon payment of the arrears of premium with interest thereon at the rate of five per centum per annum, and, at the option of the insured, either (*a*) upon the payment in cash to the company of any indebtedness which existed at said date of default, together with interest thereon at the above rate, or (*b*) upon reinstatement of such indebtedness increased by the amount of interest thereon at the above rate, provided such reinstated increased indebtedness does not exceed the loan value at the date to which reinstatement is made.

Modes of Settlement.—The insured or the owner, or the beneficiary after the insured's death in case the injured shall have made no election, may by written notice to the company at its home office, elect to have the net sum payable under this policy upon the death of the insured, paid either in cash or as follows:

1) By the payment of an annuity equal to three per centum of such net sum payable at the end of each year during the lifetime of the beneficiary and by the payment upon the death of the beneficiary of the said net sum together with any accrued portion of the annuity for the year then current, unless otherwise directed in said notice to the beneficiary's legal representative or assigns.

(2) By the payment of equal annual installments for a specified number of years, the first installment being payable immediately, in accordance with the following table for each one thousand dollars of said net sum.

(3) By the payment of equal annual installments payable at the beginning of each year for a fixed period of twenty years and for so many years longer as the beneficiary shall survive, in accordance with the following table for each one thousand dollars of said net sum.

17 Any installments payable under (2) or (3) which shall not have been paid prior to the death of the beneficiary shall be paid, unless otherwise directed in said notice, to the beneficiary's legal representatives or assigns.

When any option calling for annual payments is elected this policy shall be surrendered upon its maturity and a supplementary non-participating contract shall be issued for the option elected.

Unless otherwise specified by the owner or by the beneficiary in making such election, the beneficiary may at any time surrender the contract guaranteeing the payment of installments for the commuted value of the payments yet to be made, computed upon the same basis as option (2) in the following table; provided that no such surrender and commutation will be made under option (3)

except after the death of the beneficiary occurring within the aforesaid twenty years:

18 Table of Installments for Each $1,000.

Option (2).				Option (3).			
Number of annual installments.	Amount of each installment.	Age of beneficiary at death of insured.	Amount of each installment.	Age of beneficiary at death of insured.	Amount of each installment.	Age of beneficiary at death of insured.	Amount of each installment.
2	$507.39	10 and	$39.52	31	$45.39	53	$58.66
3	343.23	11 under	39.70	32	45.82	54	59.32
4	261.99	12	39.88	33	46.27	55	59.96
5	211.99	13	40.08	34	46.73	56	60.58
6	179.22	14	40.28	35	47.22	57	61.16
7	155.83	15	40.49	36	47.73	58	61.72
8	138.30	16	40.71	37	48.25	59	62.23
9	124.69	17	40.94	38	48.79	60	62.71
10	113.81	18	41.18	39	49.36	61	63.15
11	104.92	19	41.42	40	49.94	62	63.54
12	97.55	20	41.68	41	50.54	63	63.89
13	91.29	21	41.95	42	51.17	64	64.20
14	85.94	22	42.24	43	51.80	65	64.45
15	81.32	23	42.53	44	52.45	66	64.67
16	77.29	24	42.84	45	53.12	67	64.85
17	73.74	25	43.16	46	53.80	68	64.98
18	70.59	26	43.49	47	54.49	69	65.09
19	67.78	27	43.84	48	55.19	70	65.16
25	55.75	29	44.58	50	56.60	72	65.23
30	49.53	30	44.98	51	57.29	73 &	65.25
30	49.53	30	44.98	51	57.29	72 &	65.25
				52	57.98	over	

Agents are not authorized to modify this policy or to extend the time for paying a premium.

In witness whereof, the company has caused this policy to be executed this sixteenth day of December, 1908. Insured elects twenty annual installments under "Modes of Settlement," No. 2.

——— ———, *Secretary.*

(Sgd.) ——— ———, *President.*

Countersigned, ——— ———.

Ass't Registrar.

19 This Application made to the Mutual Life Insurance of New York is the basis and a part of a proposed contract of insurance, subject to the charter of the company and the laws of the State of New York. I hereby agree that all the following state-

ments and answers, and all those that I make to the company's medical examiner, in continuation of this application, are by me warranted to be true and are offered to the company as a consideration of the contract, which I hereby agree to accept, and which shall not take effect unless and until the first premium shall have been paid, during my continuance in good health, and unless also the policy shall have been signed by the president and secretary and countersigned by the registrar of the company and issued during my continuance in good health; unless a binding receipt has been issued as hereinafter provided.

I further agree that in any distribution of surplus, the principals and methods which may then be in use by the company for such distribution and its determination of the amount apportioned to such policy shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest in the contract.

1. My full name is Cilbey L. Wiggins.

2. I reside at Pine Barren, in the City of Pine Barren, County, of Escambia, State of Fla.

3. I do not contemplate going to any foreign country except none.

4. My former residences were same.

5. My place of business is Pine Barren, Fla.

6. My P. O. address is Pine Barren, Fla.

7. My present occupation is president of McMillan Mill Co., following branch of business or trade lumber mfg.

8. My other occupations are none.

9. My former occupations have been same.

10. The full name of the person to whom the insurance is payable is estate.

11. Residing in —.

12. The relationship of said beneficiary to me is —.

13. The insurable interest of the said beneficiary in the life proposed for insurance, other than that of family relationship is —.

20 14. Do you wish the privilege of changing the beneficiary from time to time provided the policy has not been assigned? Yes.

15. I hereby apply for insurance on my life on the ordinary life payable in twenty installments plan life payments.

16. Amount, $30,648, in four policies of equal amount.

17. The premiums are to be paid annually.

18. I was born on the 5th day of July, 1847, in Escambia Co., Fla.

19. I am a citizen or subject of U. S. A.

20. I have been accepted for insurance under the following policies in this company, none.

21. I am insured in other companies and associations as follows: Prudential, $30,000.00; Equitable, $20,000.00; Fraternal, $5,000; and in no others.

22. I have never made an application for life insurance to any

company or association upon which a policy has not been issued on the plan and premium rate originally applied for, except as to the following companies or associations: None, and no such application is now pending or awaiting decision.

I hereby warrant and agree that during the period of one year following the date of issuance of the contract of insurance for which application is hereby made, I will not engage in any of the following extra hazardous occupations or employments; retailing intoxicating liquors, handling electric wires and dynamos, blasting, mining, submarine labor, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad train or track or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the company.

I also warrant and agree that I will not die by my own act, whether sane or insane, during the period of one year next following said date of issue.

I have paid $— in cash to the subscribing soliciting agent, who has furnished me with a binding receipt thereof signed by the secretary of the company making the insurance in force from this date, provided this application shall be approved, and the policy duly issued.

Done at Pine Barren, Fla., Dec. 15, 1908.

Signature of person whose life is proposed for insurance:

CILBEY L. WIGGINS.

21 I have known the above named applicant for six years and saw him sign this application. I have issued binding receipt No. —.

J. D. TORREY,
Soliciting Agent.

J. T. TORREY,
Manager, Mobile, Ala.

Medical Examiner's Report.

1. (*a*) What is your full name? Cilbey L. Wiggins. (*b*) Age at last birthday? 61.

2. Are you married? Yes.

3. (*a*) What illness, disease or accidents have you had since childhood? (The examiner should satisfy himself that the applicant gives full and careful answer to this question.)

Name of disease: Pneumonia.
Number of attacks: One.
Date of each: 1899.
Duration: 30.
Severity: Not severe.
Results: Complete recovery.
Date of complete recovery: ——.

3. (*b*) Have you stated in your answer to question 3 (*a*) all such illnesses, diseases or accidents? Yes.

4. State every physician whom you have consulted in the past five years. None.

Name of Physician: —— ——.

Address: ——.

When consulted: ——.

Nature of complaint. Give full details above under Q. 3 (*a*) —.

5. Have you ever raised or spat blood? No.

6. (*a*) Are you now in good health? Yes. (*b*) If not, what is the impairment? —.

7. (*a*) Have you a rupture or hernia? (*b*) If so, do you wear a suitable truss? —.

8. Have you undergone any surgical operation? No.

22 9. Have you lost any part of an arm or leg? No. (*b*) Have you any bodily malformation? No.

10. Have you any impairment of sight or hearing? No.

11. Have you been successfully vaccinated? Yes.

12. (*a*) Have you gained or lost weight in the past year? No. (*b*) If so, how much and from what cause? —.

13. (*a*) Have you ever been under treatment at any asylum, cure hospital or sanitarium? No.

(*b*) If so, when, how long and for what? —.

14. (*a*) What is your present occupation? Pres't McMillan Mill Co.

(*b*) How long have you been engaged in this occupation? 31 years.

(*c*) What other occupations have you been engaged in? None.

(*d*) Do you contemplate making any change, temporary or permanent, in your occupation? No.

(*e*) Are you engaged in any way in the sale or manufacture of beer, wine, or other intoxicating liquors? No.

(*f*) How long have you been so engaged? Never.

15. (*a*) Have you ever changed your residence on account of your health? No.

(*b*) Do you contemplate making any change in your place of residence? No.

16. Have you ever been examined for a policy in any company or association which was not issued as applied for? No.

17. Family record of applicant:

Father—dead; age 30; specific cause of death, don't know; how long sick, don't know.

Mother—living; age, 80; health, good for age.

Brothers—Number living 1; age, 63; health, good. Number dead, 1; age, 68; specific cause of death, died during war; dead how long? —. Applicant has two brothers of which he knows nothing whether living or dead.

Sisters—number living, none. Number dead, none.

Age of father's father, if living? Don't know. If not, age at death.

Age of father's mother, if living? Don't know. If not, age at death.

23 Age of mother's father, if living? Don't know. If not, age at death.

Age of mother's mother, if living? Don't know. If not, age at death.

18. Was there any suspicion of tuberculosis or consumption or insanity or cancer as a cause of death among those mentioned above? No.

19. (*a*) Has any member of your household suffered from tuberculosis or consumption during the past year? No.

(*b*) If so, give details.

Dated at Pine Barren, State of Florida, the 16 day of December, 1908.

I hereby certify that my answers to the foregoing questions are correctly recorded by the medical examiner.

CILBEY L. WIGGINS,
Signature of the person examined.

Witness:
J. S. TURBERVILLE, M. D.

Indorsements on said policy are as follows: Life Policy. No. 1765206. The Mutual Life Insurance Company of New York. Insurance on the Life of Cilbey, L. Wiggins. Amount, $7662. Date, December 16th, 1908. Term of Life. Annual premium, $626.90. Cecil Wilcox, Manager, Jacksonville, Fla. 1 F Life. Annual Distribution. January 1, 1908.

EXHIBIT "B."

Ordinary Life.

The Mutual Life Insurance Company of New York.

Number 176520. Amount $7662. Age 61.

Annual Premium $626.90.

In consideration of the — annual premium of six hundred twenty-six and 90/100 dollars (the receipt of which is hereby acknowledged) and of the payment of a like amount upon each six-
24 teenth day of December hereafter until the death of the insured, promises to pay at the home office of the company in the City of New York upon receipt at said home office of due proof of the death of Cilbey L. Wiggins, of Pine Barren, County of Escambia, State of Florida, herein called the insured, seventy-six hundred and sixty-two dollars, less any indebtedness hereon to the company and any unpaid portion of the premium for the then current policy-year, upon surrender of this policy properly receipted, to his executors, administrators or assigns, the beneficiaries, with the right of revocation.

Change of Beneficiary.—When the right of revocation has been reserved, or in case of the death of any beneficiary under either

a revocable or irrevocable designation the insured is [if] there be no existing assignment of the policy made as herewith provided, may, while the policy is in force, designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the home office of the company accompanied by the policy for suitable indorsement thereon. Such change shall take effect upon the indorsement of the name on the policy by the company. If any beneficiary shall die before the insured the interest of such beneficiary shall vest in the insured.

Payment of Premiums.—The company will accept payment of premiums at other times than as state- above, as follows:

$326.00 semi-annually on each sixteenth day of December and June or $166.10 quarter-annually on each sixteenth day of December, March, June and September, provided such change is made on any anniversary of the date of this policy.

Except as herein provided the payment of a premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable.

All premiums are payable in advance at said home office or to any agent of the company, upon delivery, on or before date due, of a receipt signed by an executive officer president, vice-president, second vice-president, secretary or treasurer) of the company and countersigned by said agent.

A grace of thirty days (or one month if greater) subject to an interest charge at the rate of five per centum per annum, shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If death occur within the period of grace the unpaid portion of the premium for the then current policy-year shall be deducted from the amount payable hereunder.

Conditions.

Residence and Travel.—This policy is free from any restriction as to residence and travel.

Occupation.—This policy is free from any restriction as to military or naval service, and, as to other occupations of the insured, it is free from any restriction after one year from its date, as set forth in the provisions of the application indorsed hereon or attached hereto.

Suicide.—The company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the issuance of this policy, as set forth in the provisions of the application indorsed hereon or attached hereto.

Incontestability.—This policy shall be incontestable except for nonpayment of premiums, provided two years shall have elapsed from its date.

This policy and the application herefor, copy of which is indorsed hereon or attached hereto, constitutes the entire contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and

no such statement of the insured shall avoid or be used in defense to a claim under this policy unless contained in the written application herefor, a copy of which is indorsed hereon or attached hereto.

If the age of the insured has been misstated the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Participation.—The proportion of the surplus accruing upon this policy shall be ascertained and distributed annually and not otherwise.

Amount of insurance payable at death.	Premiums payable during life.	Annual dividend period.

Dividends.—Dividends at the option of the insured or the
26 owner of this policy shall on the 16th day of December, of each year be either—

(1) Paid in cash; or,

(2) Applied toward the payment of any premium or premiums; or,

(3) Applied to the purchase of paid up additions to the policy; or,

(4) Left to accumulate to the credit of the policy with interest at the rate of three per centum per annum and payable at the maturity of the policy, but withdrawable on any anniversay of the policy.

Unless the insured or the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of paid-up additions as per option (3). Such paid up additions may be surrendered at any time for a cash value, which shall not be less than the original cash dividends as per option (1).

Loans.—At any time after three full years' premiums have been paid, and while this policy is in force the company will advance, on the execution of a proper loan agreement and on proper assignment and delivery of this policy and on the sole security hereof an amount which with interest thereon to the end of the current policy-year shall be equal to or at the option of the owner less than the cash value at the end of said year; any existing loan hereon with accrued interest, and any equal portion of said current policy-year's premium shall be paid out of such advance. Interest on the loan will be at the rate of five per centum per annum payable at the end of each policy-year and this interest if not paid annually shall be added to the existing loan, and shall bear interest at the same rate. Failure to repay any such advance or to pay interest shall not avoid this policy unless the total indebtedness hereon to the company shall equal or exceed the cash value at the time of such failure, or until one month after notice shall have been mailed by the company to the last known address of the insured and of the assignees of record, if any, at the home office of the company.

Assignment.—No assignment of this policy shall be binding

upon the company, unless it be filed with the company at its
27 home office. The company assumes no responsibility as to the validity of any assignment.

Options on Surrender or Lapse.—After this policy shall have been in force three full years, the owner within three months after any default in payment of premium, but not later, may elect either—

(*a*) To surrender this policy for its cash value less any indebtedness to the company hereon (this balance is hereinafter referred to as the net cash value); or,

(*b*) To have the insurance continue in force as term insurance from the date of such default, without future participation and without the right to loan or cash value, for an amount equal to the face amount of this policy and any outstanding dividend additions less any indebtedness to the company hereon; or,

(*c*) To purchase non-participating paid-up life insurance payable at the same time and on the same conditions as this policy.

The cash value under option (*a*), after premiums have been paid for three full years or more, will be the reserve at the date of default for the face amount of this policy and for any dividend additions hereto, computed according to the American Experience Table of Mortality assuming interest at the rate of three per centum per annum, less a surrender charge at the following rate per thousand dollars insured by the face amount of this policy, to-wit: If three full years' premiums have been paid, fifteen dollars; if *your* [four] full years' premiums have been paid, twelve and a half dollars; if five full years' premiums have been paid, ten dollars; if six full years' premiums have been paid, ten dollars; if seven full years' premiums have been paid, seven and a half dollars; if eight full years' premiums have been paid, five dollars; if nine full years' premiums have been paid, two and a half dollars; provided, however, that in no case shall such surrender charge be more than one-fifth of the reserve on the above basis for the face amount insured by this policy and further provided that after premiums have been paid for ten full years or more there shall be no surrender charge.

The term for which the insurance will be continued under option (*b*) or the amount of the paid-up life insurance obtainable under
28 option (*c*), will be such as the net cash value obtainable under option (*a*), will purchase at the attained age of the insured at date of default when applied as a net single premium according to the American Experience Table of Mortality assuming interest at the rate of three per centum per annum. If the insured shall not within three months after default in payment of premium surrender this policy to the company at the home office for its cash value as provided in option (*a*), or for paid-up insurance as provided in option (*c*), the insurance will be continued as provided in option (*b*).

Table of Loan and Surrender Values.

The values in the following table are computed in accordance with the above provisions and upon the assumption that premiums have been paid in full for the number of years the "policy has been

in force." If there be any indebtedness to the company on the policy, or if there be any outstanding dividend additions, the values will be modified as hereinbefore provided.

The cash and loan values and the paid-up life insurance stated in the following table apply to a policy for $1,000.00. As this policy is for $7,662, the cash, loan, or paid-up life insurance available at the end of any policy-year will be 7 & 662/1000 times the amount stated in the table for that year.

The period of paid-up continued insurance remains the same for a policy of any amount.

29

Column 1.	Column 2.	Column 3.		
After policy has been in force	Cash value. Loan value.	Paid-up non-participating life insurance.	Paid-up non-participating continued (term) insurance for		
			Years.	Months.	Days.
3	$90	$127	2	5	0
4	127	176	3	9	0
5	164	223	3	9	0
6	198	266	4	2	0
7	234	309	4	7	0
8	269	351	4	11	0
9	303	391	5	2	0
10	337	429	5	4	0
11	368	462	5	6	0
12	398	493	5	7	0
13	427	523	5	7	0
14	456	552	5	8	0
15	484	580	5	7	0
16	512	607	5	7	0
17	539	633	5	6	0
18	566	653	5	4	0
19	593	682	5	3	0
20	619	705	5	1	0
21	644	727	4	11	0
22	669	749	4	8	0
23	694	770	4	6	0
24	718	790	4	3	0
25	743	810	3	11	0

Years

Values for later years will be *copured* [computed] upon the above stated basis and will be furnished upon request.

The cash value provided for in the above table for the end of a policy-year, less interest thereon at the rate of five per centum per annum to the end of such policy years, can be obtained during such policy-years, provided all premiums due prior to the end of such policy-years shall have been duly paid.

The loan values provided for in the above table for the end of the policy-years can be obtained (less interest) during such policy-years as explained in the above cause entitled "Loans."

30 Reinstatement.—Unless it shall have been surrendered for its cash value, this policy may be reinstated at any time within three years from date of default of payment of any premium, upon evidence of insurability, satisfactory to the company and upon payment of the arrears of premium with interest thereon at the rate of five per centum per annum, and, at the option of the insured, either (*a*) upon the payment in cash to the company of any indebtedness which existed at said date of default, together with interest thereon at the above rate, or (*b*) upon reinstatement of such indebtedness increased by the amount of interest thereon at the above rate, provided such reinstated increased indebtedness does not exceed the loan value at the date to which reinstatement is made.

Modes of Settlement.—The insured or the owner, or the beneficiary after the insured's death in case the insured shall have made no election, may by written notice to the company at its home office elect to have the net sum payable under this policy upon the death of the insured, paid either in cash or as follows:

(1) By the payment of an annuity equal to three per centum of such net sum payable at the end of each year during the lifetime of the beneficiary and by the payment upon the death of the beneficiary of the said net sum, together with any accrued portion of the annuity for the year then current, unless otherwise directed in said notice to the beneficiary's legal representative or assigns.

(2) By the payment of equal annual installments for a specified number of years, the first installment being payable immediately, in accordance with the following table for each one thousand dollars of said net sum.

(3) By the payment of equal annual installments payable at the beginning of each year for a fixed period of twenty years and for so many years longer as the beneficiary shall survive, in accordance with the following table for each one thousand dollars of said net sum.

Any installments payable under (2) or (3) which shall not have been paid prior to the death of the beneficiary shall be paid, unless otherwise directed in said notice, to the beneficiary's legal representatives or assigns.

31 When any option calling for annual payments is elected, this policy shall be surrendered upon its maturity and a supplementary non-participating contract shall be issued for the option elected.

Unless otherwise specified by the owner or by the beneficiary in making such election, the beneficiary may at any time surrender the contract guaranteeing the payment of installments for the commuted value of the payments yet to be made, computed upon the same basis as option (2) in the following table; provided, that no such surrender and commutation will be made under option (3) except after the death of the beneficiary occurring within the aforesaid twenty years:

Table of Installments for Each $1,000.

Option (2).				Option (3).			
Number of annual installments.	Amount of each installment.	Age of beneficiary at death of insured.	Amount of each installment.	Age of beneficiary at death of insured.	Amount of each installment.	Age of beneficiary at death of insured.	Amount of each installment.
2	$507.39	10 and	$39.52	31	$45.39	53	$58.6
3	343.23	11 un-	39.70	32	45.82	54	59.3
4	261.99	12 der	39.88	33	46.27	55	59.9
5	211.99	13	40.08	34	46.73	56	60.5
6	179.22	14	40.28	35	47.22	57	61.1
7	155.83	15	40.49	36	47.73	58	61.7
8	138.30	16	40.71	37	48.25	59	62.3
9	124.69	17	40.94	38	48.79	60	62.7
10	113.81	18	41.18	39	49.36	61	63.1
11	104.92	19	41.42	40	49.94	62	63.5
12	97.55	20	41.68	41	50.54	63	63.8
13	91.29	21	41.95	42	51.17	64	64.2
14	85.94	22	42.24	43	51.80	65	64.4
15	81.32	23	42.53	44	52.45	66	64.6
16	77.29	24	42.84	45	53.12	67	64.8
17	73.74	25	43.16	46	53.80	68	64.9
18	70.59	26	43.49	47	54.49	69	65.0
19	67.78	27	43.84	48	55.19	70	65.1
20	65.25	28	44.20	49	55.89	71	65.2
25	55.75	29	44.58	50	56.60	72	65.2
30	49.53	30	44.98	51	57.29	73 &	65.2
				52	57.98	over	

32 Agents are not authorized to modify this policy or to exten the time for paying a premium.

In witness whereof, the company has caused this policy to be exe cuted this sixteenth day of December, 1908. Insured elects twent annual installments under "Modes of Settlement," No. 2.

—— ——, *Secretary.*

(Sgd.)

Countersigned:

—— ——, *President.*

——— ———,
Ass't Registrar.

This Application

Made to the Mutual Life Insurance Company of New York is th basis and a part of a proposed contract of insurance, subject to th charter of the company and the laws of the State of New York. hereby agree that all the following statements and answers, and al those that I make to the company's medical examiner, in continua

tion of this application, are by me warranted to be true and are offered to the company as a consideration of the contract, which I hereby agree to accept, and which shall not take effect unless and until the first premium shall have been paid, during my continuance in good health, and unless also the policy shall have been signed by the president and secretary and countersigned by the registrar of the company and issued during my continuance in good health; unless a binding receipt has been issued as hereinafter provided. I further agree that in any distribution of surplus, the principals and methods which may then be in use by the company for such distribution and its determination of the amount apportioned to such policy shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest in the contract.

1. My full name is Cilbey L. Wiggins.

2. I reside at Pine Barren, in the City of Pine Barren, County of Escambia, State of Fla.

3. I do not contemplate going to any foreign country except none.

4. My former residences were same.

33 5. My place of business is Pine Barren, Fla.

6. My P. O. address is Pine Barren, Fla.

7. My present occupation is president of McMillan Mill Co., following branch of business or trade lumber mfg.

8. My other occupations are none.

9. My former occupations have been same.

10. The full name of the person to whom the insurance is payable is estate.

11. Residing in —.

12. The relationship of said beneficiary to me is —.

13. The insurable interest of the said beneficiary in the life proposed for insurance, other than that of family relationship is —.

14. Do you wish the privilege of changing the beneficiary from time to time provided the policy has not been assigned? Yes.

15. I hereby apply for insurance on my life on the ordinary life payable in twenty installments plan life payments.

16. Amount, $30,648, in four policies of equal amount.

17. The premiums are to be paid annually.

18. I was born on the 5th day of July, 1847, in Escambia Co., Fla.

19. I am a citizen or subject of U. S. A.

20. I have been accepted for insurance under the following policies in this company, none.

21. I am insured in other companies and associations as follows:

34 Prudential, $30,000.00; Equitable, $20,000.00; Fraternal, $5,000; and in no others.

22. I have never made an application for life insurance to any company or associations upon which a policy has not been issued on the plan and premium rate originally applied for, except as to the following companies or association, none, and no such application is now pending or awaiting decision.

I hereby warrant and agree that during the period of one year fol-

lowing the date of issuance of the contract of insurance, for which application is hereby made, I will not engage in any of the following extra hazardous occupations or employments: retailing intoxicating liquors, handling electric wires and dynamos, blasting, mining, submarine labor, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad train or track or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the company.

I also warrant and agree that I will not die by my own act, whether sane or insane, during the period of one year next following said date of issue.

I have paid $— in cash to the subscribing soliciting agent, who has furnished me with a binding receipt thereof signed by the secretary of the company making the insurance in force from this date, provided this application shall be approved, and the policy duly issued.

Done at Pine Barren, Fla., Dec. 15, 1908.

Signature of person whose life is proposed for insurance:

CILBEY L. WIGGINS.

I have known the above named applicant for six years and saw him sign this application. I have issued binding receipt No. —.

J. D. TORREY,
Soliciting Agent.

J. D. TORREY, *Manager,*
Mobile, Ala.

Medical Examiner's Report.

1. (*a*) What is your full name? Cilbey L. Wiggins. (*b*) Age at last birthday? 61.

35 2. Are you married? Yes.

3 What illness, disease or accidents have you had since childhood? (The examiner should satisfy himself that the applicant gives full and careful answers to this question.)

Name of disease: Pneumonia.
Number of attacks: One.
Date of each: 1899.
Duration: 30.
Severity: Not severe.
Results: Complete recovery.
Date of complete recovery: —.

3. (*b*) Have you stated in your answer to question 3 (*a*) all such illnesses, diseases or accidents?

4. State every physician whom you have consulted in the past five years: None.

Name of physician: —— ——.
Address: —.
When consulted: —.
Nature of complaint: Give full details above under Q. 3 (*a*): —.

5. Have you ever raised or spat blood? No.

6. (*a*) Are you now in good health? Yes. (*b*) If not, what is the impairment? —.

7. (*a*) Have you a rupture or hernia? (*b*) If so, do you wear a suitable truss? —.

8. Have you undergone any surgical operation? No.

9. Have you lost any part of an arm or leg? No. (*b*) Have you any bodily malformation? No.

10. Have you any impairment of sight or hearing? No.

11. Have you been successfully vaccinated? Yes.

36 (*a*) Have you gained or lost weight in the past year? No.

(*b*) If so, how much and from what cause? —.

13. (*a*) Have you ever been under treatment at any asylum, cure hospital or sanitarium? No.

(*b*) If so, when, how long and for what? —.

14. (*a*) What is your present occupation? Pres't McMillan Mill Co.

(*b*) How long have you been engaged in this occupation? 31 years.

(*c*) What other occupations have you been engaged in? None.

(*d*) Do you contemplate making any change, temporary or permanent, in your occupation? No.

(*e*) Are you engaged in any way in the sale or manufacture of beer, wine or other intoxicating liquors? No.

(*f*) How long have you been so engaged? Never.

15. (*a*) Have you ever changed your residence on account of your health? No.

(*b*) Do you contemplate making any change in your place of residence? No.

16. Have you ever been examined for a policy in any company or association which was not issued as applied for? No.

17. Family record of applicant:

Father—Dead; age 30; specific cause of death, don't know; how long sick, don't know.

Mother—Living; age, 80; health, good for age.

Brothers—Two. Number living, 1; age, 63; health, good. Number dead, 1; age, 68; specific cause of death, died during war; dead how long, —. Applicant has two brothers of which he knows nothing, whether living or dead.

Sisters—Number living, none; number dead, none.

Age of father's father, if living? Don't know. If not, age at death.

37 Age of father's mother, if living? Don't know. If not, age at death.

Age of mother's father, if living? Don't know. If not, age at death.

Age of mother's mother, if living? Don't know. If not, age at death.

18. Was there any suspicion of tuberculosis or consumption or insanity or cancer as a cause of death among those mentioned above? No.

19. (*a*) Has any member of your household suffered from tuberculosis or consumption during the past year? No.

(*b*) If so, give details?

Dated at Pine Barren, State of Florida, the 16 day of December, 1908.

I hereby certify that my answers to the foregoing questions are correctly recorded by the medical examiner.

CILBEY L. WIGGINS,
Signature of the person examined.

Witness:
J. S. TURBERVILLE, M. D.

Indorsements on said policy are as follows: Life Policy. No. (not given). The Mutual Life Insurance Company of New York. Insurance on the Life of Cilbey L. Wiggins. Amount $7,662. Date, December 16th, 1908. Term of life. Annual premium, $626.90. Cecil Wilcox, Manager, Jacksonville, Fla. 1 F Life. Annual Distribution. January 1, 1908.

38 EXHIBIT "C."

Ordinary Life.

Mutual Life Insurance Company, of New York.

Number 176520. Amount $7,662. Age 61.

Annual Premium $626.90.

In consideration of the — annual premium of six hundred twenty-six and 90/100 dollars (the receipt of which is hereby acknowledged), and of the payment of a like amount upon each sixteenth day of December hereafter until the death of the insured, promises to pay at the home office of the company in the City of New York, upon receipt at said home office of due proof of the death of Cilbey L. Wiggins, of Pine Barren, County of Escambia, State of Florida, herein called the insured, seventy-six hundred and sixty-two dollars, less any indebtedness hereon to the company and any unpaid portion of the premium for the then current policy-year, upon surrender of this policy properly receipted, to his executors, administrators or assigns, the beneficiaries, with the right of revocation.

Change of Beneficiary.—When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the insured *is* [*if*] there be no existing assignment of the policy made as herein provided, may, while the policy is in force, designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the home office of the company, accompanied by the policy for suitable indorsement thereon. Such change shall take effect upon the indorsement of the name on the policy by the company. If any beneficiary shall die before the insured, the interest of such beneficiary shall vest in the insured.

Payment of Premiums.—The company will accept payment of premiums at other times than as state- above, as follows:

$326.00 semi-annually on each sixteenth day of December and June or $166.10 quarter-annually on each sixteenth day of December, March, June and September, provided such change is made on any anniversary of the date of this policy.

39 Except as herein provided the payment of a premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable.

All premiums are payable in advance at said home office or to any agent of the company, upon delivery, on or before date due, of a receipt signed by an executive officer (president, vice-president, second vice-president, secretary or treasurer) of the company and countersigned by said agent.

A grace of thirty days (or one month if greater) subject to an interest charge at the rate of five per centum per annum, shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If death occur within the period of grace the unpaid portion of the premium for the then current policy-year shall be deducted from the amount payable thereunder.

Conditions.

Residence and Travel.—This policy is free from any restriction as to residence and travel.

Occupation.—This policy is free from any restriction as to military or naval service, and, as to other occupations of the insured, it is free from any restriction after one year from its date, as set forth in the provisions of the application indorsed hereon or attached hereto.

Suicide.—The company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the issuance of this policy, as set forth in the provisions of the application indorsed hereon or attached hereto.

Incontestability.—This policy shall be incontestable except for nonpayment of premiums, provided two years shall have elapsed from its date.

This policy and the application therefor, copy of which is indorsed hereon or attached hereto, constitutes the entire contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the insured shall avoid or be used in defense to a claim under this policy unless contained in the written application therefor, a copy of which is indorsed hereon or attached hereto.

If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Participation.—The proportion of the surplus accruing upon this policy shall be ascertained and distributed annually and not otherwise.

Amount of insurance payable at death.	Premiums payable during life.	Annual dividend period.

Dividends.—Dividends at the option of the insured or the owner of this policy shall on the 16th day of December, of each year, be either—

(1) Paid in cash; or,

(2) Applied toward the payment of any premium or premiums; or,

(3) Applied to the purchase of paid up additions to the policy; or,

(4) Left to accumulate to the credit of the policy with interest at the rate of three per centum per annum and payable at the maturity of the policy, but withdrawable on any anniversary of the policy.

Unless the insured or the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of paid-up additions as per option (3). Such paid up additions may be surrendered at any time for a cash value which shall not be less than the original cash dividends as per option (1).

Loans.—At any time after three full years' premiums have been paid, and while this policy is in force the company will advance, on the execution of a proper loan agreement and on proper assignment and delivery of this policy and on the sole security hereof an amount which with interest thereon to the end of the current policy-year shall be equal to or at the option of the owner less than the cash value at the end of said year; any existing loan hereon with accrued interest, and any equal portion of said current policy-year's premium shall be paid out of such advance. Interest on the loan will be at the rate of five per centum per annum payable at the end of each policy-year and this interest if not paid annually shall be added to the existing loan, and shall bear interest at the same rate. Failure to repay any such advance or to pay interest shall not avoid this policy unless the total indebtedness hereon to the company shall equal or exceed the cash value at the time of such failure, or until one month after notice shall have been mailed by the company to the last known address of the insured and of the assignees of record, if any, at the home office of the company.

41

Assignment.—No assignment of this policy shall be binding upon the company, unless it be filed with the company at its home office. The company assumes no responsibility as to the validity of any assignment.

Options on Surrender or Lapse.—After this policy shall have been in force three full years, the owner within three months after any default in payment of premium, but not later, may elect either—

(*a*) To surrender this policy for its cash value less any indebtedness to the company hereon (this balance is hereinafter referred to as the net cash value); or,

(*b*) To have the insurance continue in force as term insurance from the date of such default, without future participation and without the right to loan or cash value, for an amount equal to the face

amount of this policy and any outstanding dividend additions less any indebtedness to the company hereon; or,

(*c*) To purchase non-participating paid-up life insurance payable at the same time and on the same conditions as this policy.

The cash value under option (*a*), after premiums have been paid for three full years or more, will be the reserve at the date of default for the face amount of this policy and for any dividend additions hereto, computed according to the American Experience Table of Mortality assuming interest at the rate of three per centum per annum, less a surrender charge at the following rate per thousand dollars insured by the face amount of this policy, to-wit: If three full years' premiums have been paid, fifteen dollars; if four full years' premiums have been paid, twelve and a half dollars; if five full years' premiums have been paid, ten dollars; if six full years' premiums have been paid, ten dollars; if seven full years' premiums have
42 been paid, seven and a half dollars; if eight full years' premiums have been paid, five dollars; if nine full years' premiums have been paid, two and a half dollars; provided, however, that in no case shall such surrender charge be more than one-fifth of the reserve on the above basis for the face amount insured by this policy and further provided that after premiums have been paid for ten full years or more there shall be no surrender charge.

The term for which the insurance will be continued under option (*b*) or the amount of the paid-up life insurance obtainable under option (*c*), will be such as the net cash value obtainable under option (*a*), will purchase at the attained age of the insured at date of default when applied as a net single premium according to the American Experience Table of Mortality assuming interest at the rate of three per centum per annum. If the insured shall not within three months after default in payment of premium surrender this policy to the company at the home office for its cash value as provided in option (*a*), or for paid-up insurance as provided in option (*c*), the insurance will be continued as provided in option (*b*).

Table of Loan and Surrender Values.

The values in the following table are computed in accordance with the above provisions and upon the assumption that premiums have been paid in full for the number of years the "policy has been in force." If there be any indebtedness to the company on the policy, or if there be any outstanding dividend additions, the values will be modified as hereinbefore provided.

The cash and loan values and the paid-up life insurance stated in the following table apply to a policy for $1,000.00. As this policy is for $7,662, the cash, loan, or paid-up life insurance available at the end of any policy-year will be 7 & 662/1000 times the amount stated in the table for that year.

The period of paid-up continued insurance remains the same for a policy of any amount.

43

After policy has been in force	Column 1. Cash value. Loan value.	Column 2. Paid-up non-participating life insurance.	Column 3. Paid-up non-participating continued (term) insurance for		
			Years.	Months.	Days
3	$90	$127	2	5	0
4	127	176	3	9	0
5	164	223	3	9	0
6	198	266	4	2	0
7	234	309	4	7	0
8	269	351	4	11	0
9	303	391	5	2	0
10	337	429	5	4	0
11	368	462	5	6	0
12	398	493	5	7	0
13	427	523	5	7	0
14	456	552	5	8	0
15	484	580	5	7	0
16	512	607	5	7	0
17	539	633	5	6	0
18	566	653	5	4	0
19	593	682	5	3	0
20	619	705	5	1	0
21	644	727	4	11	0
22	669	749	4	8	0
23	694	770	4	6	0
24	718	790	4	3	0
25	743	810	3	11	0

Years

Values for later years will be *computed* [computed] upon t above stated basis and will be furnished upon request.

The cash value provided for in the above table for the end of policy-year, less interest thereon at the rate of five per centum p annum to the end of such policy years, can be obtained during su policy-year, provided all premiums due prior to the end of su policy-year shall have been duly paid.

The loan values provided for in the above table for the end of t policy years can be obtained (less interest) during such policy-yea as explained in the above cause entitled "Loans."

44 Reinstatement.—Unless it shall have been surrendered f its cash value, this policy may be reinstated at any ti within three years from date of default of payment of any premiu upon evidence of insurability, satisfactory to the company and up payment of the arrears of premium with interest thereon at the ra of five per centum per annum, and, at the option of the insure either (*a*) upon the payment in cash to the company of any i debtedness which existed at said date of default together with i terest thereon at the above rate, or (*b*) upon reinstatement of su indebtedness increased by the amount of interest thereon at t

above rate, provided such reinstated increased indebtedness does not exceed the loan value at the date to which reinstatement is made.

Modes of Settlement.—The insured or the owner, or the beneficiary after the insured's death in case the insured shall have made no election, may by written notice to the company at its home office, elect to have the net sum payable under this policy upon the death of the insured, paid either in cash or as follows:

(1) By the payment of an annuity equal to three per centum of such net sum payable at the end of each year during the lifetime of the beneficiary and by the payment upon the death of the beneficiary of the said net sum together with any accrued portion of the annuity for the year then current, unless otherwise directed in said notice to the beneficiary's legal representative or assigns.

(2) By the payment of equal annual installments for a specified number of years, the first installment being payable immediately, in accordance with the following table for each one thousand dollars of said net sum.

(3) By the payment of equal annual installments payable at the beginning of each year for a fixed period of twenty years and for so many years longer as the beneficiary shall survive, in accordance with the following table for each one thousand dollars of said net sum.

Any installments payable under (2) or (3) which shall not have been paid prior to the death of the beneficiary shall be paid, unless otherwise directed in said notice, to the beneficiary's legal representatives or assigns.

45 When any option calling for annual payments is elected, this policy shall be surrendered upon its maturity and a supplementary non-participating contract shall be issued for the option elected.

Unless otherwise specified by the owner or by the beneficiary in making such election, the beneficiary may at any time surrender the contract guaranteeing the payment of installments for the commuted value of the payments yet to be made, computed upon the same basis as option (2) in the following table; provided that no such surrender and commutation will be made under option (3) except after the death of the beneficiary occurring within the aforesaid twenty years:

Table of Installments for Each $1,000.

Option (2).				Option (3).			
Number of annual installments.	Amount of each installment.	Age of beneficiary at death of insured.	Amount of each installment.	Age of beneficiary at death of insured.	Amount of each installment.	Age of beneficiary at death of insured.	Amount of each installment.
2	$507.39	10 and	$39.52	31	$45.39	53	$58.66
3	343.23	11 un-	39.70	32	45.82	54	59.32
4	261.99	12 der	39.88	33	46.27	55	59.96
5	211.99	13	40.08	34	46.73	56	60.58
6	179.22	14	40.28	35	47.22	57	61.16
7	155.83	15	40.49	36	47.73	58	61.72
8	138.30	16	40.71	37	48.25	59	62.23
9	124.69	17	40.94	38	48.79	60	62.71
10	113.81	18	41.18	39	49.36	61	63.15
11	104.92	19	41.42	40	49.94	62	63.54
12	97.55	20	41.68	41	50.54	63	63.89
13	91.29	21	41.95	42	51.17	64	64.20
14	85.94	22	42.24	43	51.80	65	64.45
15	81.32	23	42.53	44	52.45	66	64.67
16	77.29	24	42.84	45	53.12	67	64.85
17	73.74	25	43.16	46	53.80	68	64.98
18	70.59	26	43.49	47	54.49	68	65.09
19	67.78	27	43.84	48	55.19	70	65.16
20	65.25	28	44.20	49	55.89	71	65.21
25	55.75	29	44.58	50	56.60	72	65.23
30	49.53	30	44.98	51	57.29	73 &	65.25
				52	57.98	over	

46 Agents are not authorized to modify this policy or to extend the time for paying a premium.

In witness whereof, the company has caused this policy to be executed this sixteenth day of December, 1908. Insured elects twenty annual installments under "Modes of Settlement," No. 2.

(Sgd.) ——— ———, *President.*

——— ———, *Secretary.*

Countersigned:

———— ————,
Ass't Registrar.

This Application

Made to the Mutual Life Insurance Company of New York is the basis and a part of a proposed contract of insurance, subject to the

charter of the company and the laws of the State of New York. I hereby agree that all the following statements and answers, and all those that I make to the company's medical examiner, in continuation of this application, are by me warranted to be true and are offered to the company as a consideration of the contract, which I hereby agree to accept, and which shall not take effect unless and until the first premium shall have been paid, during my continuance in good health, and unless also the policy shall have been signed by the president and secretary and countersigned by the registrar of the company and issued during my continuance in good health; unless a binding receipt has been issued as hereinafter provided. I further agree that in any distribution of surplus, the principals and methods which may then be in use by the company for such distribution and its determination of the amount apportioned to such policy shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest in the contract.

1. My full name is Cilbey L. Wiggins.

2. I reside at Pine Barren, in the City of Pine Barren, County of Escambia, State of Fla.

3. I do not contemplate going to any foreign country except none.

4. My former residences were same.

5. My place of business is Pine Barren, Fla.

6. My P. O. address is Pine Barren, Fla.

7. My present occupation is president of McMillan Mill
47 Co., following branch of business or trade lumber mfg.

8. My other occupations are none.

9. My former occupations have been same.

10. The full name of the person to whom the insurance is payable is estate.

11. Residing in ——.

12. The relationship of said beneficiary to me is ——.

13. The insurable interest of the said beneficiary in the life proposed for insurance, other than that of family relationship is ——.

14. Do you wish the privilege of changing the beneficiary from time to time provided the policy has not been assigned? Yes.

15. I hereby apply for insurance on my life on the ordinary life payable in twenty installments plan life payments.

16. Amount, $20,648, in four policies of equal amount.

17. The premiums are to be paid annually.

18. I was born on the 5th day of July, 1847, in Escambia Co., Fla.

19. I am a citizen or subject of U. S. A.

20. I have been accepted for insurance under the following policies in this company, none.

21. I am insured in other companies and associations as follows: Prudential, $30,000.00; Equitable, $20,000.00; Fraternal, $5,000; and in no others.

22. I have never made an application for life insurance to any company or association upon which a policy has not been issued on the plan and premium rate originally applied for, except as to

the following companies or associations, none, and no such application is now pending or awaiting decision.

I hereby warrant and agree that during the period of one year following the date of issuance of the contract of insurance for which application is hereby made, I will not engage in any of the following extra hazardous occupations or employments: retailing intoxicating liquors, handling electric wires and dynamos, blasting, mining, submarine labor, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad train
48 or track or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the company.

I also warrant and agree that I will not die by my own act, whether sane or insane, during the period of one year next following said date of issue.

I have paid $— in cash to the subscribing soliciting agent, who has furnished me with a binding receipt thereof signed by the secretary of the company making the insurance in force from this date, provided this application shall be approved, and the policy duly issued.

Done at Pine Barren, Fla., Dec. 15, 1908.

Signature of person whose life is proposed for insurance:
CILBEY L. WIGGINS.

I have known the above named applicant for six years and saw him sign this application. I have issued binding receipt No. —.
J. D. TORREY,
Soliciting Agent.

J. D. TORREY,
Manager, Mobile, Ala.

Medical Examiner's Report.

1. (*a*) What is your full name? Cilbey L. Wiggins. (*b*) Age at last birthday? 61.

2. Are you married? Yes.

3. (*a*) What illness, disease or accidents have you had since childhood? (The examiner should satisfy himself that the applicant gives full and careful answers to this question.)

Name of disease: Pneumonia.
Number of attacks: One.
Date of each: 1899.
Duration: 30.
Severity: Not severe.
Results: Complete recovery.
Date of complete recovery: —.

49 3. (*b*) Have you stated in your answer to question 3 (*a*) all such illnesses or accidents? Yes.

4. State every physician whom you have consulted in the past five years. None.

Name of physician: —— ——.
Address: ——.
When consulted: ——.
Nature of complaint. Give full details above under Q. 3 (*a*): ——.

5. Have you ever raised or spat blood? No.
6. (*a*) Are you now in good health? Yes. (*b*) If not, what is the impairment? ——.
7. (*a*) Have you a rupture or hernia? (*b*) If so, do you wear a suitable truss? ——.
8. Have you undergone any surgical operation? No.
9. Have you lost any part of an arm or leg? No. (*b*) Have you any bodily malformation? No.
10. Have you any impairment of sight or hearing? No.
11. Have you been successfully vaccinated? Yes.
12. (*a*) Have you gained or lost weight in the past year? No.
(*b*) If so, how much and from what cause? ——.
13. (*a*) Have you ever been under treatment at any asylum, cure hospital or sanitarium? No.
(*b*) If so, when, how long and for what? ——.
14. (*a*) What is your present occupation? Pres't McMillan Mill Co.
(*b*) How long have you been engaged in this occupation? 31 years.
(*c*) What other occupations have you been engaged in? None.
(*d*) Do you contemplate making any change, temporary or permanent, in your occupation? No.
(*e*) Are you engaged in any way in the sale or manufacture of beer, wine, or other intoxicating liquors? No.
(*f*) How long have you been so engaged? Never.
15. (*a*) Have you ever changed your residence on account of your health? No.
(*b*) Do you contemplate making any change in your place of residence? No.
16. Have you ever been examined for a policy in any company or association which was not issued as applied for? No.
17. Family record of applicant:
Father—Dead: age, 30; specific cause of death, don't know; how long sick, don't know.
Mother—Living: age, 80; health, good for age.
Brothers—Two. Number living, 1; age 63; health, good. Number dead, 1; age, 68; specific cause of death, died during war. Dead how long? ——. Applicant has two brothers of which he knows nothing whether living or dead.
Sisters—Number living, none; number dead, none.
Age of father's father, if living? Don't know. If not, age at death.
Age of father's mother, if living? Don't know. If not, age at death.

Age of mother's father, if living? Don't know. If not, age at death.

Age of mother's mother, if living? Don't know. If not, age at death.

18. Was there any suspicion of tuberculosis or consumption or insanity or cancer as a cause of death among those mentioned above? No.

19. (*a*) Has any member of your household suffered from tuberculois or consumption during the past year? No.

(*b*) If so, give details?

Dated at Pine Barren, State of Florida, the 16 day of December, 1908.

I hereby certify that my answers to the foregoing questions are correctly recorded by the medical examiner.

CILBEY L. WIGGINS.
Signature of the person examined.

Witness:
J. S. TURBERVILLE, M. D.

Indorsements on said policy are as follows: Life Policy. No. 1765210. The Mutual Life Insurance Company of New York. Insurance on the Life of Cilbey L. Wiggins. Amount $7,662. Date, December 16th, 1908. Term of Life. Annual premium, $626.90. Cecil Wilcox, Manager, Jacksonville, Fla. 1 F. Life. Annual Distribution. January 1, 1908.

51 EXHIBIT "D."

Ordinary Life.

Mutual Life Insurance Company of New York.

Number 176,520. Amount, $7,662. Age, 61. Annual Premium, $626.90.

In consideration of the — annual premium of six hundred twenty-six and 90/100 dollars (the receipt of which is hereby acknowledged) and of the payment of a like amount upon each sixteenth day of December hereafter until the death of the insured, promises to pay at the home office of the company in the City of New York upon receipt at said home office of due proof of the death of Cilbey L. Wiggins, of Pine Barren, County of Escambia, State of Florida, herein called the insured, seventy-six hundred and sixty-two dollars less any indebtedness hereon to the company and any unpaid portion of the premium for the then current policy-year, upon surrender of this policy properly receipted, to his executors, administrators or assigns, the beneficiaries, with the right of revocation.

Change of Beneficiary.—When the right of revocation has been reserved, or in case of the death of any beneficiary under either a

revocable or irrevocable designation the insured is [if] there be no existing assignment of the policy made as herein provided, may, while the policy is in force, designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the home office of the company, accompanied by the policy for suitable indorsement thereon. Such change shall take effect upon the indorsement of the name on the policy by the company. If any beneficiary shall die before the insured the interest of such beneficiary shall vest in the insured.

Payment of Premiums.—The company will accept payment of premiums at other times than as state- above, as follows:

$326.00 semi-annually on each sixteenth day of December and June or $166.10 quarter-annually on each sixteenth day of December, March, June and September, provided such change is made on any anniversary of the date of this policy.

52 Except as herein provided the payment of a premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable.

All premiums are payable in advance at said home office or to any agent of the company, upon delivery, on or before date due, of a receipt signed by an executive officer (president, vice-president, second vice-president, secretary or treasurer) of the company and countersigned by said agent.

A grace of thirty days (or one month if greater) subject to an interest charge at the rate of five per centum per annum, shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If death occur within the period of grace the unpaid portion of the premium for the then current policy-year shall be deducted from the amount payable hereunder.

Conditions.

Residence and Travel.—This policy is free from any restriction as to residence and travel.

Occupation.—This policy is free from any restriction as to military or naval service, and as to other occupations of the insured, it is free from any restriction after one year from its date, as set forth in the provisions of the application indorsed hereon or attached hereto.

Suicide.—The company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the issuance of this policy, as set forth in the provisions of the application indorsed hereon or attached hereto.

Incontestability.—This policy shall be incontestable except for nonpayment of premiums, provided two years shall have elapsed from its date.

This policy and the application herefor, copy of which is indorsed hereon or attached hereto, constitutes the entire contract between

the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties and no such statement of the insured shall avoid or be used in defense to a claim under this policy unless contained in the written application herefor, a copy of which is indorsed hereon or attached hereto.

53 If the age of the insured has been misstated the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Participation.—The proportion of the surplus accruing upon this policy shall be ascertained and distributed annually and not otherwise.

Amount of insurance payable at death, —.

Premiums payable during life, —.

Annual dividend period, —.

Dividends.—Dividends at the option of the insured or the owner of this policy shall on the 16th day of December, of each year be either—

(1) Paid in cash; or,

(2) Applied toward the payment of any premium or premiums; or,

(3) Applied to the purchase of paid up additions to the policy; or,

(4) Left to accumulate to the credit of the policy with interest at the rate of three per centum per annum and p[illegible]ble at the maturity of the policy, but withdrawable on any [illegible]ersary of the policy.

Unless the insured or the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of paid-up additions as per option (3). Such paid up additions may be surrendered at any time for a cash value which shall not be less than the original cash dividends as per option (1).

Loans.—At any time after three full years' premiums have been paid, and while this policy is in force, the company will advance, on the execution of a proper loan agreement and on proper assignment and delivery of this policy and on the sole security hereof an amount which with interest thereon to the end of the current policy-year shall be equal to or at the option of the owner less than the cash value at the end of said year; any existing loan hereon with accrued interest, and any equal portion of said current policy-year's premium shall be paid out of such advance. Interest on the loan will be at

54 the rate of five per centum per annum, payable at the end of each policy-year, and this interest if not paid annually shall be added to the existing loan, and shall bear interest at the same rate. Failure to repay any such advance or to pay interest shall not avoid this policy unless the total indebtedness hereon to the company shall equal or exceed the cash value at the time of such failure, or until one month after notice shall have been mailed by the company to the last known address of the insured and of the assignees of record, if any, at the home office of the company.

Assignment.—No assignment of this policy shall be binding upon the company, unless it be filed with the company at its home office. The company assumes no responsibility as to the validity of any assignment.

Options on Surrender or Lapse.—After this policy shall have been in force three full years, the owner within three months after any default in payment of premium, but not later, may elect either—

(*a*) To surrender this policy for its cash value less any indebtedness to the company hereon (this balance is hereinafter referred to as the net cash value); or,

(*b*) To have the insurance continue in force as term insurance from the date of such default, without future participation and without the right to loan or cash value, for an amount equal to the face amount of this policy and any out-standing dividend additions less any indebtedness to the company hereon; or,

(*c*) To purchase non-participating paid-up life insurance payable at the same time and on the same conditions as this policy.

The cash value under option (*a*), after premiums have been paid for three full years or more, will be the reserve at the date of default for the face amount of this policy and for any dividend additions hereto, computed according to the American Experience Table of Mortality assuming interest at the rate of three per centum per annum, less a surrender charge at the following rate per thousand dollars insured by the face amount of this policy, to-wit: If three full years' premiums have been paid, fifteen dollars; if four full years' premiums have been paid, twelve and a half dollars; if five full years' premiums have been paid, ten dollars; if six full years' premiums have been paid, ten dollars; if seven full years' premiums have been paid, seven and a half dollars; if eight full years' premiums have been paid, five dollars; if nine full years' premiums have been paid, two and a half dollars; provided, however, that in no case shall such surrender charge be more than one-fifth of the reserve on the above basis for the face amount insured by this policy and further provided that after premiums have been paid for ten full years or more there shall be no surrender charge.

The term for which the insurance will be continued under option (*b*) or the amount of the paid-up life insurance obtainable under option (*c*), will be such as the net cash value obtainable under option (*a*), will purchase at the attained age of the insured at date of default when applied as a net single premium according to the American Experience Table of Mortality assuming interest at the rate of three per centum per annum. If the insured shall not within three months after default in payment of premium surrender this policy to the company at the home office for its cash value as provided in option (*a*), or for paid-up insurance as provided in option (*c*), the insurance will be continued as provided in option (*b*).

Table of Loan and Surrender Values.

The values in the following table are computed in accordance with the above provisions and upon the assumption that premiums have been paid in full for the number of years the "Policy has been in force." If there be any indebtedness to the company on the policy, or if there be any outstanding dividend additions, the values will be modified as hereinbefore provided.

The cash and loan values and the paid-up life insurance stated in the following table apply to a policy for $1,000.00. As this policy is for $7,362. the cash, loan or paid-up life insurance available at the end of any policy-year will be 7 & 632/1,000 times the amount stated in the table for that year.

The period of paid-up continued insurance remains the same for a policy of any amount.

56

After policy has been in force	Column 1. Cash value. Loan value.	Column 2 Paid-up non-participating life insurance.	Column 3. Paid-up non-participating continued (term) insurance for		
			Years.	Months.	Days.
3	$90	$127	2	5	0
4	127	176	3	9	0
5	164	223	3	9	0
6	198	266	4	2	0
7	234	309	4	7	0
8	269	351	4	11	0
9	303	391	5	2	0
10	337	429	5	4	0
11	368	462	5	6	0
12	398	493	5	7	0
13	427	523	5	7	0
14	456	552	5	8	0
15	484	580	5	7	0
16	512	607	5	7	0
17	539	633	5	6	0
18	566	658	5	4	0
19	593	682	5	3	0
20	619	705	5	1	0
21	644	727	4	11	0
22	669	749	4	8	0
23	694	770	4	6	0
24	718	790	4	3	0
25 Years.	743	810	3	11	0

Values for later years will be compured [computed] upon the above stated basis and will be furnished upon request.

The cash value provided for in the above table for the end of a policy-year, less interest thereon at the rate of five per centum per

annum to the end of such policy years, can be obtained during such policy-years, provided all premiums due prior to the end of such policy-year shall have been duly paid. The loan values provided for in the above table for the end of the policy-years can be obtained (less interest) during such policy-years as explained in the above cause entitled "Loans."

57 Reinstatement.—Unless it shall have been surrendered for its cash value, this policy may be reinstated at any time within three years from date of default of payment of any premium, upon evidence of insurability, satisfactory to the company and upon payment of the arrears of premium with interest thereon at the rate of five per centum per annum, and at the option of the insured, either (*a*) upon the payment in cash to the company of any indebtedness which existed at said date of default, together with interest thereon at the above rate, or (*b*) upon reinstatement of such indebtedness increased by the amount of interest thereon at the above rate, provided such reinstated increased indebtedness does not exceed the loan value at the date to which reinstatement is made.

Modes of Settlement.—The insured or the owner, or the beneficiary after the insured's death in case the insured shall have made no election, may by written notice to the company at its home office, elect to have the net sum payable under this policy upon the death of the insured, paid either in cash or as follows:

(1) By the payment of an annuity equal to three per centum of such net sum payable at the end of each year during the lifetime of the beneficiary and by the payment upon the death of the beneficiary of the said net sum, together with any accrued portion of the annuity for the year then current, unless otherwise directed in said notice to the beneficiary's legal representative or assigns.

(2) By the payment of equal annual installments for a specified number of years, the first installment being payable immediately, in accordance with the following table for each one thousand dollars of said net sum.

(3) By the payment of equal annual installments payable at the beginning of each year for a fixed period of twenty years and for so many years longer as the beneficiary shall survive, in accordance with the following table for each one thousand dollars of said net sum.

Any installments payable under (2) or (3) which shall not have been paid prior to the death of the beneficiary shall be paid, unless otherwise directed in said notice, to the beneficiary's legal representatives or assigns.

When any option calling for annual payments is elected, this policy shall be surrendered upon its maturity and a supplementary non-participating contract shall be issued for the option elected.

58 Unless otherwise specified by the owner or by the beneficiary in making such election, the beneficiary may at any time surrender the contract guaranteeing the payment of installments for the commuted value of the payments yet to be made,

computed upon the same basis option (2) in the following table; provided that no such surrender and commutation will be made under option (3) except after the death of the beneficiary occurring within the aforesaid twenty years:

Table of Installments for Each $1,000.

Option (2).				Option (3).			
Number of annual installments.	Amount of each installment.	Age of beneficiary at death of insured.	Amount of each installment.	Age of beneficiary at death of insured.	Amount of each installment.	Age of beneficiary at death of insured.	Amount of each installment.
2	$507.39	10 and	$39.52	31	$45.39	53	$58.66
3	343.23	11 under	39.70	32	45.82	54	59.32
4	261.99	12	39.88	33	46.27	55	59.96
5	211.99	13	40.08	34	46.73	56	60.58
6	179.22	14	40.28	35	47.22	57	61.16
7	155.83	15	40.49	36	47.73	58	61.72
8	138.30	16	40.71	37	48.25	59	62.23
9	124.69	17	40.94	38	48.79	60	62.71
10	113.81	18	41.18	39	49.36	61	63.15
11	104.92	19	41.42	40	49.94	62	63.54
12	97.55	20	41.68	41	50.54	63	63.89
13	91.29	21	41.95	42	51.17	64	64.20
14	85.94	22	42.24	43	51.80	65	64.45
15	81.32	23	42.53	44	52.45	66	64.67
16	77.29	24	42.84	45	53.12	67	64.85
17	73.74	25	43.16	46	53.80	68	64.98
18	70.59	26	43.49	47	54.49	69	65.09
19	67.78	27	43.84	48	55.19	70	65.16
20	65.25	28	44.20	49	55.89	71	65.21
25	55.75	29	44.58	50	56.60	72	65.23
30	49.53	30	44.98	51	57.29	73 & over	65.25
				52	57.98		

59 Agents are not authorized to modify this policy or to extend the time for paying a premium.

In witness whereof, the company has caused this policy to be executed this sixteenth day of December, 1908. Insured elects twenty annual installments under "Modes of Settlement." No. 2.

—— —— *Secretary.*

(S'g'd) —— —— *President.*

Countersigned: —— ——,
Ass't Registrar.

This Application

Made to the Mutual Life Insurance Company of New York is the basis and a part of a proposed contract of insurance, subject to the charter of the company and the laws of the State of New York. I hereby agree that all the following statements and answers, and all those that I make to the company's medical examiner, in continuation of this application, are by me warranted to be true and are offered to the company as a consideration of the contract, which I hereby agree to accept, and which shall not take effect unless and until the first premium shall have been paid, during my continuance in good health, and unless also the policy shall have been signed by the president and secretary and countersigned by the registrar of the company and issued during my continuance in good health; unless a binding receipt has been issued as hereinafter provided. I further agree that in any distribution of surplus, the principals and methods which may then be in use by the company for such distribution and its determination of the amount apportioned to such policy shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest in the contract.

1. My full name is Cilbey L. Wiggins.

2. I reside at Pine Barren, in the City of Pine Barren, County of Escambia, State of Fla.

3. I do not contemplate going to any foreign country except none.

4. My former residences were same.

5. My place of business is Pine Barren, Fla.

6. My P. O. address is Pine Barren, Fla.

7. My present occupation is president of McMillan Mill
60 Co., following branch of business of trade lumber m'f'g.

8. My other occupations are none.

9. My former occupations have been same.

10. The full name of the person to whom the insurance is payable is estate.

11. Residing in —.

12. Relationship of said beneficiary to me is —.

13. The insurable interest of the said beneficiary in the life proposed for insurance, other than that of family relationship, is —.

14. Do you wish the privilege of changing the beneficiary from time to time provided the policy has not been assigned? Yes.

15. I hereby apply for insurance on my life on the ordinary life payable in twenty installments plan life payments.

16. Amount, $38,648, in four policies of equal amount.

17. The premiums are to be paid annually.

18. I was born on the 5th day of July, 1847, in Escambia Co., Fla.

19. I am a citizen or subject of U. S. A.

20. I have been accepted for insurance under the following policies in this company, none.

21. I am insured in other companies and associations as follows:

Prudential, $30,000.00; Equitable, $20,000.00; Fraternal $5
000.00; and in no others.

22. I have never made an application for life insurance to an
company or association upon which a policy has not been issue
on the plan and premium rate originally applied for, except as
the following companies or associations, none, and no such appl
cation is now pending or awaiting decision.

I hereby warrant and agree that during the period of one yea
following the date of issuance of the contract of insurance fo
which application is hereby made, I will not engage in any of th
following extra hazardous occupations or employments: retailin
intoxicating liquors, handling electric wires and dynamos, blastin
mining, submarine labor, aeronautic ascensions, the manufactu
of highly explosive substances, service upon any railroad train
track or in switching or in coupling cars, or on any stea
61 or other vessel, unless written permission is expressly grante
by the company.

I also warrant and agree that I will not die by my own ac
whether sane or insane, during the period of one year next follow
ing said date of issue.

I have paid $ — in cash to the subscribing soliciting agent, wh
has furnished me with a binding receipt thereof signed by th
secretary of the company making the insurance in force from th
date, provided this application shall be approved, and the polic
duly issued.

Done at Pine Barren, Fla., Dec. 15, 1908.

Signature of person whose life is proposed for insurance:

CILBEY L. WIGGINS.

I have known the above named applicant for six years and sa
him sign this application. I have issued binding receipt No. —

J. D. TORREY,
Soliciting Agent.

J. D. TORREY,
Manager, Mobile, Ala.

Medical Examiner's Report.

1. (*a*) What is your full name? Cilbey L. Wiggins. (*b*) Ag
at last birthday? 61.

2. Are you married? Yes.

3. (*a*) What illness, disease or accidents have you had sinc
childhood? (The examiner should satisfy himself that the appl
cant gives full and careful answers to this question.)

Name of disease: Pneumonia.
Number of attacks: One.
Date of each: 1899.
Duration: 30.
Severity: Not severe.
Results: Complete recovery.
Date of complete recovery: —.

3. (*b*) Have you stated in your answer to question 3 (*a*) all such illnesses, diseases or accidents? Yes.

4. State every physician whom you have consulted in the past five years. None.

62 Name of Physician: —— ——.
Address: —.
When consulted: —.
Nature of complaint. Give full details above under Q. 3 (*a*): —.

5. Have you ever raised or spat blood? No.

6. (*a*) Are you now in good health? Yes. (*b*) If not, what is the impairment? —.

7. (*a*) Have you a rupture or hernia? (*b*) If so, do you wear a suitable truss? —.

8. Have you undergone any surgical operation? No.

9. Have you lost any part of an arm or leg? No. (*b*) Have you any bodily malformation? No.

10. Have you any impairment of sight or hearing? No.

11. Have you been successfully vaccinated? Yes.

12. (*a*) Have you gained or lost weight in the past year? No. (*b*) If so, how much and from what cause? —.

13. (*a*) Have you ever been under treatment at any asylum, cure, hospital or sanitarium? No.
(*b*) If so, when, how long and for what? —

14. (*a*) What is your present occupation? Pres't McMillan Mill Co.
(*b*) How long have you been engaged in this occupation? 31 years.
(*c*) What other occupations have you been engaged in? None.
(*d*) Do you contemplate making any change, temporary or permanent, in your occupation? No.
(*e*) Are you engaged in any way in the sale or manufacture of beer, wine, or other intoxicating liquors? No.
(*f*) How long have you been so engaged? Never.

15. (*a*) Have you ever changed your residence on account of your health? No.
(*b*) Do you contemplate making any change in your place of residence? No.

16. Have you ever been examined for a policy in any company or association which was not issued as applied for? No.

17. Family record of applicant:

63 Father—Dead; age, 30; specific cause of death, don't know; how long sick, don't know.
Mother—Living; age 80; health, good for age.
Brothers—Two. Number living, one; age, 63; health, good. Number dead, one; age, 68; specific cause of death, died during war; dead how long? —. Applicant has two brothers of which he knows nothing, whether living or dead.
Sisters—Number living, none; number dead, none.
Age of father's father, if living? Don't know. If not, age at death.

Age of father's mother, if living? Don't know. If not, age at death.

Age of mother's father, if living? Don't know. If not, age at death.

Age of mother's mother, if living? Don't know. If not, age at death.

18. Was there any suspicion of tuberculosis or consumption or insanity or cancer as a cause of death among those mentioned above? No.

19. (*a*) Has any member of your household suffered from tuberculosis or consumption during the past year? No.

(*b*) If so, give details?

Dated at Pine Barren, State of Florida, the 16th day of December, 1908.

I hereby certify that my answers to the foregoing questions are correctly recorded by the medical examiner.

CILBEY L. WIGGINS,
Signature of the person examined.

Witness:
J. S. TURBERVILLE, M. D.

Indorsements on said policy are as follows: Life Policy. No. 1765208. The Mutual Life Insurance Company of New York. Insurance on the Life of Cilbey L. Wiggins. Amount $7662. Date, December 16th, 1908. Term of Life. Annual premium, $626.90. Cecil Wilcox, Manager, Jacksonville, Fla. 1 F. Life Annual Distribution. January 1, 1908.

64 On the 28th day of June, 1910, petition for removal was filed in the words and figures as follows:

In the Circuit Court of the First Judicial Circuit for Escambia County, Florida.

L. HILTON-GREEN & W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased, Plaintiffs,
vs.
MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendant.

To the Honorable J. Emmet Wolfe, Judge of said Court:

The petitioner, the Mutual Life Insurance Company of New York, respectfully represents that the plaintiffs were at the time of the commencement of this suit, and are now, citizens and residents of the State of Florida.

That the defendant is and was at the time of the commencement of this suit, a corporation chartered, organized and doing business under the laws of the State of New York.

That the matter and amount in dispute in this suit exceeds the sum or value of two thousand ($2,000.00) dollars, exclusive of interests and costs.

Wherefore, your petitioner, the defendant herein, prays that this Court may cause the record herein to be removed into the Circuit Court of the United States for the Northern District of Florida at Pensacola, on the first day of next session.

EMMET WILSON,
Attorney for the Petitioner,
the Defendant.

STATE OF FLORIDA,
Escambia County:

Before me personally appeared Emmet Wilson, who being duly sworn, deposes and says that he is agent for the defendant, the Mutual Life Insurance Company of New York, for the purpose of making this affidavit, and that the matters and things stated in the foregoing petition are true.

EMMET WILSON.

Sworn to and subscribed to this 24 day of June, 1910.

F. W. MARSH, *Clerk.*
[OFFICIAL SEAL.] By A. G. CHIPLEY, *D. C.*

65 The indorsements upon the following petition are in the words and figures following: Circuit Court, Escambia County. L. Hilton-Green, et al., Etc., Pl'tiff, vs. The Mutual Life Insurance Co., Etc., Def't. Petition for Removal. Filed before me June 27th, 1910. J. Emmet Wolfe, Judge. Filed June 28, 1910. Jas. Macgibbon, Clerk Circuit Court. Emmet Wilson, Att'y for Petitioner.

On the 28th day of June, 1910, the defendant filed its bond in the words and figures following, viz:

Know All Men By These Presents: That we, The Mutual Life Insurance Company of New York, a corporation, as principal, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, having an office and usual place of business at No. 66 Liberty Street, in the City of New York, as surety, are held and firmly bound unto L. Hilton-Green and W. A. Finlay, Jr., as executors of the estate of C. L. Wiggins, deceased, in the sum of five hundred dollars ($500.00) lawful money of the United States of America for the payment whereof well and truly to be made, the said The Mutual Life Insurance Company of New York and the said United States Fidelity and Guaranty Company, bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed this 20th day of June, in the year of our Lord one thousand nine hundred and ten.

This obligation is upon the condition, however, that whereas the said principal has petitioned the Circuit Court of Escambia County, Florida, for removal of a certain cause therein pending wherein the said obligees are plaintiffs, and the said principal is defendant, to the Circuit Court of the United States in and for the Northern District of Florida.

Now, if the said principal shall enter in the said Circuit Court of the United States, on the first day of the next session, a copy of the record in the said suit, and shall well and truly pay all costs that may be awarded by the said Circuit Court of the United States, — the said Court shall hold that said suit was wrongfully and improperly
66 removed thereto, then this obligation shall be void; otherwise, it shall remain in full force and virtue.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
By GARNETTE M. WHITE,
2nd Vice-President.

[CORPORATE SEAL.]

Attest:
WILLIAM FREDERICK DIX,
Secretary.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN,
Manager.

[CORPORATE SEAL.]

Attest:
GEORGE E. HAYES,
Attorney in Fact.

The above bond approved by me this 27th day of June, 1910.
J. EMMET WOLFE,
Judge Circuit Court.

Statement.

United States Fidelity and Guaranty Company.

Capital Paid in Cash $2,000,000.
Total Resources Over $5,200,000.
New York Office, 66 Liberty Street.
Home Office, Baltimore, Md.
Sylvester J. O'Sullivan, Manager.

At the Close of Business March 31st, 1910.
Commenced Business August 1, 1896.

Par value	Assets.	Market value.
$110,000.00	Government bonds	$112,225.00
2,212,355.90	Baltimore City and other municipal, State and county bonds	2,159,672.09
446,000.00	Railroad bonds	427,515.00
405,000.00	Equipment bonds	400,297.50
200,000.00	Street railway bonds	192,462.50

186,200.00	Miscellaneous bonds	178,816.00
84,700.00	Bank stocks	143,528.00
100,000.00	Lawyers Surety Co. stock	150,000.00
3,744,255.90	Total bonds and stock	$3,764,516.09
7	Home office property (assessed valuation $406,450.00)	400,000.00
	ther real estate	63,850.00
	oans secured by mortgage	3,000.00
	oans secured by collaterals	128,220.92
	ash on hand and in depositories	334,363.51
	remiums in course of collection, not more than three months due, less commissions	441,050.06
	ue and accrued by U. S. Government under contract	15,748.39
	dvance, secured	48,146.75
	ue for subscriptions, department of guaranteed attorneys not over three months due	34,277.50
	ccount with suspended bank (68%)	1,649.38
	terest and rents due and accrued	46,319.73
		$5,281,142.33

Liabilities.

	pital stock paid in cash	$2,000,000.00
	ie for return premiums and re-insurance	15,772.11
	unich Re-Insurance Company reserve account	18,758.16
	eserve for taxes and expenses	25,000.00
	remium reserve $1,736,439.12	
	eserve for claim and contingencies. 867,592.21	
	rplus 617,580.73	
		3,221,612.06
		$5,281,142.33

ATE OF NEW YORK,
County of New York, ss:

George E. Hayes, being duly sworn, says that he is the attorney fact of the United States Fidelity and Guaranty Company, and at, to the best of his knowledge and belief, the foregoing is a true d correct statement of the financial condition of said company, of March 31, 1910, and that the financial condition of said com-ny is as favorable now as it was when such statement was made.

GEORGE E. HAYES.

Sworn to and subscribed before me this 20 day of Jun-, 1910.

[NOTARY SEAL.]

DANIEL C. DEASY,
Notary Public, New York County.

68 *Affidavit, Acknowledgment, and Justification by the United States Fidelity and Guaranty Company.*

STATE OF NEW YORK,
County of New York, ss:

Before me personally came Sylvester J. O'Sullivan, known to me to be the manager of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of The Mutual Life *and* Insurance Company, as surety thereon, and being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the manager of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporation- to be accepted as surety on bonds; that the seal affixed to the annexed bond of The Mutual Life Insurance Company is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as manager of said company; and that he is acquainted with George E. Hayes and knows him to be attorney in fact of said company; and that the signature of said George E. Hayes, subscribed to said bond, is the genuine handwriting of said George E. Hayes, and was thereto subscribed by order and authority of said *bond* [board] of directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever by more than the sum of two million dollars ($2,000,000.00).

[CORPORATE SEAL.] SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 20 day of June, 1910.

[NOTARY SEAL.] DANIEL C. DEASEY,
Notary Public, New York County.

69 The indorsements upon the foregoing bond are in the words and figures following: Circuit Court of Escambia County, Florida. L. Hilton-Green and W. A. Finley, Jr., as Executors of the Estate of C. L. Wiggins, Dec'd, Plaintiffs, against The Mutual Life Insurance Company of New York, Defendant. Bond. Filed before me June 27th, 1910. J. Emmet Wolfe, Judge. Filed June 28, 1910. Jac. Macgibbon, Clerk Circuit Court.

On the 28th day of June, 1910, order on petition for removal was filed in the words and figures following, viz.:

In the Circuit Court of Escambia County, Florida.

Hilton-Green and W. A. Finley, Jr., as Executors of the Estate of Cibley L. Wiggins, Deceased, Plaintiffs,
vs.
ie Mutual Life Insurance Company of New York, a Corporation, Defendant.

This cause came on to be heard upon petition of the defendant remove the cause to the Circuit Court of the United States for the orthern District of Florida, and the defendant having presented th said petition a bond, with surety, as required by law, and the urt having considered said petition, it is ordered that this cause , and the same is hereby, removed into the Circuit Court of the ited States for the Northern District of Florida, at Pensacola.
Done and ordered at Marianna, Florida, this 27th day of June, D. 1910.

J. EMMET WOLFE, *Judge.*

Indorsements upon the foregoing order are in the words and ures following: Circuit Court, Escambia Co., Fla. L. Hilton-een & W. A. Finley, Jr., Etc., Plaintiffs, versus The Mutual Life surance Co., of New York, Defendant. Order for Removal. Filed ne 28, 1910. Jas. Macgibbon, Clerk Circuit Court.

I, Jas. Macgibbon, Clerk of the Circuit Court in and for the County of Escambia, State of Florida, do hereby certify that the foregoing pages, numbered from one (1) to seventy-two (72) contain a true and correct transcript of the record of e proceedings in the case of L. Hilton-Green and W. A. Finley, , as executors of the estate of C. L. Wiggins, deceased, against ie Mutual Life Insurance Company of New York, a corporation, fendant, and a true and correct recital and copy of such pages and oceedings in said cause as appears upon the records and *filed* les] of this office that have been directed to be included in this nscript.
In testimony whereof I have hereunto set my hand and affixed e seal of the said Circuit Court this 4th day of July, A. D. 1910.

[OFFICIAL SEAL.] JAS. MACGIBBON,
Clerk of the Circuit Court for the First Judicial Circuit of the State of Florida in and for Escambia County.

Indorsed: L. Hilton-Green & W. A. Finley, Jr., Etc., vs. Mutual fe Ins. Co. Transcript of proceedings in Circuit Court, Escambia unty, Fla. Filed July 4, 1910. F. W. Marsh, Clerk.

And, afterwards, to-wit, on the 1st day of December, A. D. 1911, me the plaintiff, and filed in the office of the clerk of said Court

an amendment to the pleadings in the cause, which amendment is the words and figures following, to-wit:

In the United States Circuit Court, Northern District of Florida, Pensacola.

L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of t Estate of C. L. Wiggins, Deceased,
versus

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

The plaintiffs amend the pleadings heretofore filed by them follows:

71 1. By striking from the exhibit attached to the declaratio the paper marked "Application."

2. By striking from said exhibit the paper marked "Medical E aminer's Report."

3. By withdrawing the amendment heretofore filed to the de laration.

4. By withdrawing the replication heretofore filed.

BLOUNT & BLOUNT & CARTER,
Attorneys for Plaintiff.

Indorsed: In the United States Circuit Court, Northern District Florida. At Pensacola. L. Hilton-Green and W. A. Finlay, J as Executors of the Estate of C. L. Wiggins, Deceased, versus Mutu Life Insurance Company of New York. Amendment to Pleading Blount & Blount & Carter, Att'ys for Pl't'ffs. Filed Dec. 1, 191 F. W. Marsh, Clerk.

And afterwards, to-wit, on the 11th day of January, A. D. 191 came the defendant, and filed in the office of the clerk of said Cou certain pleas, which are in the words and figures following, to-wit:

In the United States District Court for the Northern District of Florida.

L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased, Plaintiff,
vs.
MUTUAL LIFE INSURANCE CO. OF NEW YORK, a Corporation, Defendant.

The defendant withdrawing all former pleas, for pleas to the de laration and to each and every count thereof, says:

1.

72 That the defendant required of the said C. L. Wiggins tha he should, prior to and as a condition to the issuance of th policies of insurance sued upon, make and sign an applica

tion to this defendant for the issuance of said policies; that he did make, sign and deliver to the defendant such application, and offered therein the statements and answers in it contained, as a consideration for and as the basis of the contracts with the defendant under the policies issued upon such application; that the policies sued upon were issued in pursuance of said application; a copy of said application is attached hereto, marked Exhibit "A," and made a part hereof; that by the terms of said policies of insurance sued upon said application became a part of the said contract of insurance; that in and by said application the said C. L. Wiggins warranted, on behalf of himself or any person who should have or claim any interest in any policy issued thereunder, that the statements and answers in said application were true, full and complete; that in said application the said C. L. Wiggins made certain answers to questions propounded by the defendant's medical examiners; that in answer to Question "3 (*a*)" in said application made by said Wiggins to this defendant, to-wit: "What illnesses, diseases or accidents have you had since childhood?" he answered, "Pneumonia of thirty days' duration, complete recovery," and in answer to Question "3 (*b*)" in said application, to-wit: 'Have you stated in answer to Question "3 (*a*)" all such illnesses, diseases or accidents?" he answered "Yes."

Defendant alleges that said answers and statements of said Wiggins are contained in the application hereinbefore referred to as Exhibit "A" made to this defendant, a copy of which said original application is attached to each of the policies sued on.

Defendant alleges that said application was made in duplicate and forwarded to the defendant by the said Wiggins, upon the receipt of which the policies sued upon were issued; that in the duplicate application the statements and answers made to the defendant's medical examiner were made to Dr. Geo. C. Kilpatrick, a copy of which duplicate application is hereto attached, marked Exhibit "B," and made a part hereof.

That the answers and statements made by the said Wiggins in said application to the defendant's medical examiner, Turberville, are the same as those statements and answers made to defendant's medical examiner, Kilpatrick.

Defendant alleges that said answer to Question "3 (*b*)" was
73 not true, full and complete, because the said Wiggins had other illnesses and diseases since childhood before the making of said application, than pneumonia, to-wit, indigestion, from which he had been a sufferer and had been treated therefor for several years, and the said Wiggins suffered from a weak and diseased heart; and had been operated upon in the month of July, 1907, prior to the making of said application for a cyst in the jawbone; and the defendant alleges that the said Wiggins knowingly and fraudulently made untrue answers to said questions "3 (*a*)" and "3 (*b*)."

Defendant alleges that by reason of the said misrepresentations said policies never took effect as binding contracts of insurance, and

the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

2.

That the defendant required of the said Wiggins that he should, prior to and as a condition of the issuance of the policies of insurance sued upon, make and sign the application referred to in the first plea, and said Wiggins did so make and sign said application; that in said application said Wiggins was asked by defendant's medical examiners the following questions, to-wit, "3 (*a*)," "What illnesses, diseases, or accidents have you had since childhood?" to which he answered, "Pneumonia of thirty days' duration, complete recovery," and was further asked, 3 (*b*), "Have you stated in answer to Question "3 (*a*)" all such illnesses, diseases or accidents?" to which he answered "Yes."

The defendant alleges that said answers were false and not true, full and complete, because said Wiggins had suffered for several years from indigestion and had been treated therefor, and had been and was a sufferer from a weak and diseased heart, and in the month of July, 1907, had been a sufferer and operated on for a cyst in the jawbone; that the existence or non-existence of these facts was material to the risk which the defendant was requested to assume upon the life of the said Wiggins, and this defendant was induced to issue said policies of life insurance by reason of said false and untrue answers to said questions; and the defendant alleges that the said Wiggins knew, or had reason to know, that said answers to said questions were false, incomplete and untrue, and made such false,
74 untrue and incomplete answers and representations for the purpose of inducing this defendant to issue said policies.

Defendant alleges that by reason of said misrepresentations and false, incomplete and untrue answers, said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaitiffs the sums of money paid to it as premiums on said policies.

3.

The defendant required of the said Wiggins that he should, prior to and as a condition of the issuance of the poplicies of insurance sued upon, make and sign the application referred to in the first plea, which the said Wiggins did so make and sign to the defendant: that at the time the said Wiggins made said application he was and had been a sufferer from indigestion and had been treated therefor: and had been and was a sufferer from a weak and diseased heart, and had been a sufferer from and was shortly before the making of said application operated on for a cyst in the jawbone; that in making said application said Wiggins was asked the question, to-wit, "3 (*a*), What illnesses, diseases or accidents have you had since childhood?" to which he answered, "Pneumonia of thirty days' duration, complete recovery;" and said Wiggins in said application was asked the question, to-wit, "3 (*b*)," "Have you stated in answer to Question "3 (*a*)" all such illnesses, diseases or accidents?" to which he answered

in said application "Yes." That his said answers were false, incomplete and untrue; and defendant alleges that the fact that Wiggins had been a sufferer from the diseases above stated was material to the risk which he requested this defendant to assume, because a knowledge of the existence of such facts would have materially influenced this defendant in determining whether it would or would not issue such policies of life insurance; that the said Wiggins knew of the existence of said facts at the time of the making of said answers, and knew, or had reason to believe, that they were material to the said risk, but fraudulently withheld the knowledge of such facts from the defendant, whereby the defendant was induced to issue said policies.

Defendant alleges that by reason of said misrepresentations said policies never took effect as binding contracts of insurance, and defendant offers to return to plaintiffs the sums of money paid to it as premiums on said policies.

4.

That in the application mentioned in the first plea, made to the defendant by said Wiggins, said Wiggins was asked by defendant's medical examiners the following question, the answer to which he warranted to be true, to-wit, "4. State every physician whom you have consulted in the past five years," and the said Wiggins answered "None."

Defendant alleges that said answer to Question "4" was not full, true and complete, because the said C. L. Wiggins had consulted physicians within the past five years, before making said answer; and defendant alleges that said Wiggins falsely and fraudulently misrepresented the fact to defendant by such answer.

Defendant alleges that by reason of the said misrepresentations, said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

5.

That the said defendant required the said Wiggins to make the application mentioned in the first plea, which he did make and deliver to the defendant, in which application the said Wiggins represented to the defendant's medical examiners, as follows: "4. State every physician whom you have consulted in the past five years," to which the said Wiggins answered "None."

Defendant alleges that said answer to Question "4" was false, untrue and incomplete, because the said Wiggins had consulted physicians within the past five years before making said representations; that the existence or non-existence of this fact was material to the risk which the defendant was requested to assume on the life of the said Wiggins, and that this defendant was induced to issue said policies by reason of the said false and untrue answer to said question; and the defendant alleges that the said Wiggins knew that the said answer was untrue, incomplete, and false, and made the same

for the purpose of inducing the defendant to issue said policies.

76 Defendant alleges that by reason of the said misrepresentation, said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

6.

Defendant alleges that at the time of the making of the application mentioned in the first plea and containing the representations shown therein, the said Wiggins was asked by defendants medical examiners the following question: "4. State every physician whom you have consulted in the past five years," to which the said Wiggins answered "None," and that at the time of the making of said answers the said Wiggins had consulted physicians within the past five years; that that fact was material to the risk which this defendant was requested to assume, because a knowledge of the existence of such fact would have materially influenced this defendant in determining whether it would or would not issue said policies of life insurance; and the said Wiggins knew of the existence of said fact at the time of making said false and untrue answer and believed that the information sought for by said question was material, but fraudulently withheld the knowledge of such fact from the defendant, and induced the defendant thereby to issue said policies.

Defendant alleges that by reason of the said misrepresentations said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

7.

Defendant alleges that in the application mentioned in the first plea and containing the warranties therein shown, upon the faith of which said policies issued, as mentioned in said first plea, the said Cilbey L. Wiggins was asked the following question: "6 (*a*) Are you in good health?" to which the said Wiggins answered "Yes."

Defendant alleges that the answer to Question "6 (*a*)" in said application, mentioned in said first plea, was not full, true and complete, because the said Wiggins was not in good health at the time of the making of said answer, but was a sufferer and had

77 been for a long time from indigestion, and a weak and diseased heart, and had been operated on in the month of July, 1907, for a cyst in the jawbone, from which ailment he had not recovered; and the defendant alleges that said answer was fraudulently made by said Wiggins.

Defendant alleges that by reason of the said misrepresentations, said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

8.

The defendant alleges that it required of the said Wiggins that he should, prior to, and as a condition of the issuance of the policies of insurance sued upon, make and sign the application referred to in the first plea, which said Wiggins did make, sign and deliver to this defendant; that in said application the said Wiggins was asked the following question: "6 (*a*) Are you in good health?" to which he answered "Yes."

Defendant alleges that said answer to Question "6 (*a*)" was false, untrue and incomplete, because the said Wiggins had been, and was at the time of the making of said representations a sufferer from indigestion and a weak and diseased heart; and had a short time prior thereto been operated upon for a cyst in the jawbone, from the effects of which he had not recovered; that the existence or non-existence of these facts was material to the risk which the defendant was requested to assume upon the life of the said Wiggins, and this defendant was induced to issue said policies by reason of said false and untrue answer to said question; and the defendant alleges that the said Wiggins knew that the said answer was false, untrue, and incomplete and material to the risk, and made same for the purpose of inducing this defendant to issue said policies.

Defendant alleges that by reason of the said misrepresentations said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

9.

That at the time of making the application mentioned in
78 the first plea, the said Wiggins was asked the following questions: "6 (*a*) Are you in good health?" to which he answered "Yes," and defendant alleges that said answer was false, incomplete and untrue, because said Wiggins at the time of the making of said representations in said application was a sufferer from indigestion and a weak and diseased heart; and had a short time prior thereto been operated upon for a cyst in the jawbone, from the effects of which he had not recovered; that these facts were material to the risk which the defendant was requested to assume, because a knowledge of the existence of such facts would have materially influenced the defendant in determining whether it would or would not issue the said policies of life insurance; that the said Wiggins knew of the existence of the said facts at the time of the making of said answer, and believed them to be material to said risk, but fraudulently withheld the knowledge of such facts from the defendant, and induced the defendant thereby to issue the said policies.

Defendant alleges that by reason of the said misrepresentations, said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

10.

That in the application mentioned in the first plea, containing the warranties enumerated in said application, the said Wiggins was asked the following questions: "8. Have you undergone any surgical operation?" to which he answered "No."

The defendant avers that the answer to said question "8" was false and untrue, because the said Wiggins, in July, 1907, was confined in a private sanitarium in the City of Montgomery, Ala., and was operated upon by physicians for a cyst in the jawbone; and the defendant alleges that said answer was falsely and fraudulently made by the said Wiggins.

Defendant alleges that by reason of the said misrepresentation, said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

79

11.

Defendant alleges that in the application mentioned in the first plea, containing the representations enumerated therein, the said Wiggins was asked the following question: "8. Have you undergone any surgical operation?" to which he answered "No."

Defendant alleges that said answer to Question "8" was false, untrue and incomplete, because the said Wiggins had been operated on by physicians in a private sanitarium in the City of Montgomery, Ala., in the month of July, 1907, for a cyst in the jawbone; that the existence or non-existence of this fact was material to the risk which the defendant was requested to assume upon the life of the said Wiggins, and this defendant was induced to issue said policies by reason of the said false and untrue answer to said question; and the said Wiggins knew that said answer was untrue, incomplete and false, and made same for the purpose of inducing this defendant to issue said policies.

Defendant alleges that by reason of the said misrepresentations, said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

12.

That at the time of the making of the application mentioned in the first plea, and containing the representations therein enumerated, the said Wiggins was asked the following question: "8. Have you undergone any surgical operation?" to which the said Wiggins answered "No," which said answer was untrue, incomplete and false, because, the said Wiggins had undergone a surgical operation in the month of July, 1907, in a private sanitarium in the City of Montgomery, Ala., such operation being for a cyst in the jawbone; that the fact that said Wiggins had been operated on as stated was material to the risk which the defendant was requested to assume, because a knowledge of the existence of such fact would have materially influenced the defendant in determining whether it would

or would not issue said policies of life insurance; and defend-
80 ant alleges that the said Wiggins knew of the existence of said fact at the time of making said answer and believed it to be material to the said risk, but fraudulently withheld the knowledge of said fact from the defendant, and induced the defendant thereby to issue said policies.

Defendant alleges that by reason of the said misrepresentations, said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

13.

That in the application mentioned in the first plea, containing the warranties therein enumerated, the said Wiggins was asked the question: "13 (*a*) Have you ever been under any treatment at any asylum, cure hospital or sanitarium?" to which he answered "No."

The defendant alleges that answer to said Question "13 (*a*)" was not full, true and complete, because the said Wiggins had in fact, in July, 1907, visited a cure in Hot Springs, Arkansas, in an effort to be relieved of ill health, and had in July, 1907, been confined in a private hospital in the City of Montgomery, Ala., and under treatment therein; and defendant alleges that said answer was falsely and fraudulently made by said Wiggins.

Defendant alleges that by reason of the said misrepresentations, said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

14.

That in the application mentioned in the first plea, and containing the representations therein enumerated, the said Wiggins was asked the following question: "13 (*a*) Have you ever been under any treatment in any asylum, cure hospital or sanitarium?" to which he answered "No."

The defendant alleges that said answer to said Question "13 (*a*) was untrue, incomplete and false, because the said Wiggins in the month of July, 1907, was under treatment at a cure in Hot Springs, Arkansas, and later in said month of July, 1907, was treated at a private hospital in the City of Montgomery, Ala.; that the
81 existence or non-existence of these facts was material to the risk which the defendant was requested to assume upon the life of said Wiggins, and this defendant was induced to issue said policies by reason of said false and untrue answer to said question; and defendant alleges that said Wiggins knew that said answer was incomplete, untrue and false, and material to the risk, and made same for the purpose of inducing this defendant to issue said policies.

Defendant alleges that by reason of the said misrepresentation, said policies never *too* [took] effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

15.

That at the time of the making of the application referred to in the first plea, containing the representations enumerated therein, the said Wiggins was asked the following question:

"13 (*a*) Have you ever been under any treatment at any asylum, cure hospital or sanitarium?" to which he answered "No," which said answer was untrue, incomplete and false, because said Wiggins in the month of July, 1907, was under treatment at a cure in Hot Springs, Arkansas, and later in said month was under treatment at a private hospital in the City of Montgomery, Ala.; that these facts were material to the risk assumed by the defendant, because a knowledge of the existence of such facts would have materially influenced the defendant in determining whether it would or would not issue said policies of life insurance; that the said Wiggins knew of the existence of said facts at the time of making said answer, and believed them to be material to the risk, but fraudulently withheld the knowledge of such facts from the defendant, and induced the defendant thereby to issue said policies.

Defendant alleges that by reason of the said misrepresentation, said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

16.

That the defendant required of the said Wiggins that he
82 make his application for the insurance policies, which are sued upon, in duplicate; that this was required by the defendant for the purpose of requiring the said Wiggins to undergo two separate medical examinations by different physicians; that said Wiggins forwarded to this defendant the said application in duplicate, with two medical examinations appearing thereon, and offered in said application the statements and answers in it contained, including the statements and answers to the defendant's medical examiners, as a consideration for and as a basis of the contract with the defendant, upon which the policies issued; a copy of the said application as made in duplicate is hereto attached and marked Exhibits "A" and "B" respectively; that in and by said application the said Wiggins warranted on behalf of himself, or any person who should have or claim any interest in any policy issued thereunder, that the statements and answers in said application were full, true and complete.

Defendant alleges that it is a rule and custom obtaining with it that when application is made for life insurance in excess of $30,000.00 that the applicant is required to undergo two separate physical examinations by different physicians, each physician to make a separate report; that the requirements for examinations of an applicant for life insurance, as stated above, is a rule of the company to safeguard its interests when application is made for insurance in so large a sum as to exceed $30,000.00. This usage or rule of the defendant was well known to the said Wiggins; that by such rule or usage the medical examiners were required to propound to said Wiggins in per-

son the questions embraced in that part of the application known as the medical examiner's report; that said examiners were required to record the answers of the said Wiggins as he personally made them, and to sign said report; the defendant alleges that said Wiggins, by said application, certified that his answers to the questions of the medical examiner, J. S. Turberville, were correctly recorded by said Turberville, and thereby represented to defendant that said Turberville had made an examination of said Wiggins, in pursuance of the said rule or usage for two examinations; defendant alleges that such statement and certificate of said Wiggins made to the defendant, that he had been examined by said Turberville, was false and untrue, because such examination was never made by said Turberville and said Turberville did not propound the questions or record the answers, which said Wiggins represented to the defendant he had done; and defendant alleges that such certificate and false representation in said application were fraudulently made by the said Wiggins.

Defendant alleges that by reason of said misrepresentation, said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

17.

That the defendant required of the said Wiggins that he should, prior to and as a condition of the issuance of the policies of life insurance sued upon, make the application and undergo the medical examinations as stated in the sixteenth plea, that said Wiggins did make said application as stated in said plea, and delivered same to this defendant, representing to this defendant that he had undergone two separate medical examinations, by separate physicians, as stated in the sixteenth plea; defendant alleges that said Wiggins certified to this defendant that he had been examined by Dr. Turberville; that said statement and certificate of said Wiggins was false and untrue, because said Turberville never made an examination of the said Wiggins as required by the usage and rule of the company, mentioned in said sixteenth plea; defendant alleges that the certificate and statement of said Wiggins, that he had been examined by the said Turberville and that the said Turberville had correctly recorded his answers, was material to the risk which the defendant was requested to assume upon the life of the said Wiggins, and this defendant was induced to issue said policies of insurance by reason of said false and untrue representations and certificate, and did so upon the belief that said certificate was true as made by said Wiggins; that said Wiggins knew that his certificate as above stated was false, untrue, and material, and made such false and untrue certificate for the purpose of inducing this defendant to issue said policies.

Defendant alleges that by reason of said misrepresentation, said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

84

18.

Defendant alleges that it required of the said Wiggins that he should, prior to and as a condition of the issuance of said policies sued upon, make his application to defendant in duplicate, and undergo two medical examinations, as stated in the sixteenth plea; that two medical examinations were not made, although said Wiggins represented and certified to the defendant that they were made; that the certificate of said Wiggins, that he had been examined by Dr. Turnerville and said Turberville had correctly recorded his answers, as stated in the sixteenth plea, was false and untrue; that the requirement of the defendant of two medical examinations, as mentioned in said sixteenth plea, was known to said Wiggins and was material to the risk which defendant was requested to assume, because the defendant would not have issued said policies of life insurance if it had had knowledge of the fact that two separate medical examinations were not made; that said Wiggins knew of the rule or usage, or requirement of the defendant for two separate medical examinations, as alleged in the said sixteenth plea, and knew that observance of such rule or custom was material to the risk which he requested the defendant to assume, but fraudulently misrepresented and certified to the defendant, as in the said sixteenth plea it is alleged, and thereby induced the defendant to issue said policies.

Defendant alleges that by reason of said misrepresentation, said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

19.

That in the application mentioned in the first plea, the said Cilbey L. Wiggins made the following statement, which he warranted in said application, as in said first plea it is alleged to be true, to-wit:

"22. I have never made an application for life insurance to any company or association, upon which a policy has not been issued on the plan and the premium rate originally applied for, except
85 to the following companies or associations; and no such application is now pending or awaiting decision."

Defendant alleges that said statement No. 22 was not full, true and complete, because the said Wiggins had made application for life insurance on the 30th day of November, 1908, to the Prudential Insurance Company of America, for forty thousand dollars ($40,000.00) life insurance, which was not issued as applied for, or in any manner, said application having been made at Mobile, Ala., and defendant alleges that said Wiggins falsely represented said facts to the defendant by said statement.

Defendant alleges that by reason of the said misrepresentation, said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

20.

That the defendant required of the said Cilbey L. Wiggins that he make the application mentioned in the first plea, for the policies of life insurance sued upon, which said application contains the representations in said first plea alleged, and in which said application said Wiggins represented to the defendant, as follows:

"22. I have never made an application for life insurance to any company or association, upon which a policy has not been issued on the plan and premium rate originally applied for, except to the following companies or associations; and no such application is now pending or awaiting decision."

Defendant alleges that said Wiggins made no exceptions in said statement, and that said statement No. 22 was false, untrue and incomplete, because said Wiggins had made application for life insurance to the Prudential Insurance Company of America, on the 3rd day of November, 1908, at Mobile, Ala., for the sum of forty thousand ($40,000.00), upon which application no insurance in any amount was issued by the said Prudential Insurance Company of America, or has been issued since; and was further untrue, false and incomplete, because said application to the Prudential Insurance Company of America was either disposed *or* [of], or pending, or awaiting decision at the time said Wiggins made said statement; that
86 the existence or non-existence of this fact was material to the risk requested to be assumed upon the life of the said Wiggins, because a knowledge of the existence of such fact would have materially influenced this defendant in determining whether it would or would not issue said policies of life insurance; that this defendant was induced to issue said policies by reason of said false, untrue and incomplete statement, and the defendant alleges that said Wiggins knew that said statement was false, untrue and incomplete and material to the risk; and knew that said statement was untrue, because no policy had issued under said application, and that the fact that it had not been so issued on account of reasons for its non-issuance, was material to the risk upon the policies in this suit; and said Wiggins had no reason to believe that said insurance had been issued upon said application, but fraudulently withheld the knowledge of such fact from the defendant, and thereby induced the defendant to issue said policies.

Defendant alleges that by reason of the said mis-representation, said policies never took effect as binding contracts of insurance, and the defendant offers to return to the said plaintiffs the sums of money paid to it as premiums on said policies.

EMMETT WILSON,
Attorney for the Defendant.

STATE OF FLORIDA,
Escambia County:

Personally appeared before me this day Emmett Wilson, who being duly sworn, deposes and says that he is attorney for the de-

fendant in the above case, and that the allegations of the foregoing pleas are true.

EMMETT WILSON.

Sworn to and subscribed before me this 1st day of January, A. D. 1912.

[SEAL.] HILDUR DAHLSTROM,
Notary Public.

Indorsed: In U. S. District Court. L. Hilton Green and W. A. Finlay, Jr., Executors, vs. Mutual Life Insurance Co., a Corporation. Pleas. Emmett Wilson, Law Offices, Pensacola, Florida. Filed Jan. 11, 1912. F. W. Marsh, Clerk.

87 And afterwards, to-wit, on the 27th day of May, A. D. 1912, came the plaintiff, and filed in the office of the clerk of said court demurrers to pleas 1 to 18 inclusive, which demurrers are in the words and figures following, to-wit:

In the United States District Court, Northern District of Florida, at Pensacola.

L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased, Plaintiffs,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant.

The plaintiffs, withdrawing all former demurrers, demur to each of the following pleas, to-wit, 1 to 18, inclusive, severally, and for grounds of demurrer say:

1.

That the said plea is bad in substance, because it does not appear that the statements therein alleged to be false, and to have been made by C. L. Wiggins, were contained in the application for the policies sued on.

2.

The plaintiffs demur additionally to the 16th plea, and say that the same is bad in substance.

1. Because it does not appear in and by the said application that the said Wiggins ever certified that he made any answers to the questions propounded to him by J. S. Turberville.

2. Because it does not appear in and by the said application what answers of the said Wiggins he certified were correctly recorded by the medical examiner.

3. Because it does not appear in and by the said application that the said Wiggins represented to the defendant that Turberville had made an examination of him, the said Wiggins.

88 4. Because it does not appear that Wiggins knew of any rule requiring the medical examiner of the defendant to pro-

pound to him, the said Wiggins, the questions embraced in the medical examiner's report.

5. Because it does not appear that the said Wiggins knew of any rule requiring the defendant's medical examiner to report the answers of the said Wiggins, as he personally made them, and to sign the medical examiner's report.

6. Because it is not alleged that the answers to the questions in said medical examiner's report were not true.

7. Because it does not state any defense to the action.

3.

The plaintiffs demur additionally to the 17th plea, and say that the same is bad in substance:

1. Because it does not appear in and by the said application that the said Wiggins ever represented to the defendant that he had undergone two separate medical examinations by two separate physicians.

2. Because it does not appear in and by the said application that the said Wiggins ever certified that he had been examined by Dr. Turberville.

3. Because it does not appear in and by the said application that the said Wiggins ever certified or stated that the said Turberville had correctly recorded his answers.

4. Because it is not alleged that the answers to the questions in said medical examiner's report were not true.

5. Because it does not state any defense to the action.

4.

The plaintiffs demur additionally to the 18th plea, and say that the same is bad in substance:

89 1. Because it does not appear in and by the said application that the said Wiggins represented and certified to the defendant that two medical examinations of him had been made.

2. That it does not appear in and by the said application that the said Wiggins certified that he had been examined by Dr. Turberville, and that the said Turberville had correctly recorded his answers:

3. Because it is not alleged that the answers to the questions in said medical examiner's report were not true.

4. Because it does not state any defense to the action.

BLOUNT & BLOUNT & CARTER,
Attorneys for Plaintiffs.

I, W. A. Blount, of counsel for the plaintiffs, hereby certify that in my opinion the foregoing demurrers are well founded in point of law, and make oath that they are not interposed for the purpose of delay.

W. A. BLOUNT.

Sworn to and subscribed before me this 27th day of May, A. D. 1912.

[SEAL.] K. B. RADCLIFFE,
Notary Public.

Indorsed: In the United States District Court, Northern Distri of Florida, at Pensacola. L. Hilton Green and W. A. Finlay, Jr., Executors of the Estate of C. L. Wiggins, Deceased, Plaintiffs, vers Mutual Life Insurance Company of New York, a Corporation, D fendant. Demurrers to Pleas 1-18, inclusive. Blount & Blount Carter, Pensacola, Florida. Filed May 27, 1912. F. W. Mars Clerk.

90 And afterwards, to-wit, on the 27th day of May, A. D. 191 was filed in the office of the clerk of said court the replicatio of the plaintiffs to the pleas of defendant, which replication is in th words and figures following, to-wit:

In the United States District Court, Northern District of Florid at Pensacola.

L. Hilton-Green and W. A. Finlay, Jr., as Executors of the Wi of Cilbey L. Higgins, Deceased, Plaintiffs,

vs.

Mutual Life Insurance Company of New York, a Corporatio Defendant.

The plaintiffs, for replication to each of the pleas of the defendan separately and severally, say:

2. That the said plea is untrue.

And plaintiffs, for replications to each of the following pleas, sep rately and severally, say:

To the first, second, third, seventh, eighth and ninth pleas:

3. That at and before the issuance of the policies sued on, the d fendant knew that the said Wiggins had suffered from, and at th time of the application mentioned in said plea, was suffering fro and had been treated for indigestion, as alleged in the said plea; tha at the time of such application he had been, and was, a sufferer fro a weak and diseased heart, as alleged in said plea, and that at th time of the said application he had been a sufferer from, and operate upon, for a cyst in the jawbone.

And plaintiffs, for replications to each of the following plea separately and severally, say:

To the fourth, fifth and sixth pleas:

4. That at and before the issuance of the policies sued on, the d fendant knew that the said Wiggins had consulted physicians withi five (5) years before the making of the application, as alleged in th plea, and knew of consultations by the said Wiggins with eve physician whom he had consulted.

91 And plaintiffs, for replications to each of the followin pleas, separately and severally, say:

To the tenth, eleventh and twelfth pleas:

5. That at and before the issuance of the policies sued on, the d fendant knew that before the making of the application the sa Wiggins had been operated upon by physicians for a cyst in th jawbone.

And plaintiffs, for replications to each of the following pleas, separately and severally, say:

To the thirteenth, fourteenth and fifteenth pleas:

6. That at and before the issuance of the policies sued on, the defendant knew that before the making of the application, as alleged in the plea, the said Wiggins had visited a cure in Hot Springs, Arkansas, in an effort to be relieved of ill health, and had been confined in a private hospital in the City of Montgomery, Alabama, and under treatment therein.

And plaintiffs for replications to each of the following pleas, separately and severally, say:

To the sixteenth, seventeenth and eighteenth pleas:

7. That at and before the issuance of the said policies, the defendant knew that the said Turberville had not examined the said Wiggins, nor propounded questions to him, nor recorded his answers, and that two separate medical examinations of the said Wiggins had not been made.

And plaintiffs, for replications to each of the following pleas, separately and severally, say:

To the nineteenth and twentieth pleas:

8. That at and before the issuance of the policies sued on, the defendant knew that before the making of the application alleged in the plea, the said Wiggins had made an application for life insurance to the Prudential Insurance Company of America for forty thousand ($40,000.00) dollars, and that no policy had been issued thereon, and that the said application to the said Prudential Insurance Company had been disposed of.

BLOUNT & BLOUNT & CARTER,
Attorneys for Plaintiffs.

92 Indorsed: In the U. S. District Court, Nor. Dis. of Fla., at Pensacola. L. Hilton Green and W. A. Finlay, Jr., as Executors of the Will of Cilbey L. Wiggins, Deceased, Plaintiffs, vs. Mutual Life Insurance Co., of New York, a Corporation, Defendant. Replications to Pleas. Blount & Blount & Carter, Pensacola, Florida. Filed May 27, 1912. F. W. Marsh, Clerk.

And afterwards, to-wit, on the 13th day of June, A. D. 1912, came the defendant, and filed in the office of the clerk of said court a rejoinder to the replication of the plaintiffs, which is in the words and figures following, to-wit:

In the United States District Court for the Northern District of Florida.

L. Hilton Green and W. A. Finlay, Jr., as Executors of the Estate of Cilbey L. Wiggins, Deceased, Plaintiffs,

vs.

The Mutual Life Insurance Company of New York, a Corporation, Defendant.

Now comes the defendant, and to the first replication to all of the defendant's pleas, says:

The defendant joins issue on the second replication to all the defendant's pleas.

The defendant alleges that plaintiffs' third replication is untrue.

The defendant alleges that plaintiffs' fourth replication is untrue.

The defendant alleges that the plaintiffs' fifth replication is untrue.

The defendant alleges that the plaintiffs' sixth replication is untrue.

The defendant alleges that the plaintiffs' seventh replication is untrue.

The defendant alleges that the plaintiffs' eighth replication is untrue.

EMMETT WILSON.
Attorney for the Defendant.

93 Indorsed: In U. S. District Court. Green, et al., vs. Mutual Life Insurance Company. Rejoinders. Emmett Wilson, Law Offices, Pensacola, Florida. Filed Jun- 13, 1912. F. W. Marsh, Clerk.

At a stated term of the District Court of the United States for the Northern District of Florida, begun and held at the City of Pensacola on the 5th day of June, A. D. 1913, present the Honorable William B. Sheppard, Judge, among the proceedings had were the following, to-wit:

Law. No. 200.

L. HILTON GREEN and W. A. FINLEY, JR., as Executors of the Estate of C. L. Wiggins, Deceased, Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant.

And now at this time this cause came on again to be heard upon the issue in the pleadings contained, and the parties and their attorneys being in court, came the following jury, to-wit:

1. S. A. Alford,
2. Frand Marston,
3. Albert J. Massey,
4. Claue L. Touart,
5. G. O. Brosnaham, Jr.,
6. C. G. Murphy,
7. G. C. Hallmark,
8. A. G. Runyan,
9. William R. Gonzalez,
10. Roland A. Langford,
11. J. Hall Sherrill,
12. Theodore D. Baars,

Who, being duly chosen, tried and sworn, and after hearing the evidence and argument of counsel, and it being the hour of adjournment the said jury, after being instructed by the Court, were allowed to separate.

94 At a stated term of the District Court of the United States for the Northern District of Florida, begun and held at the

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City of Pensacola on the 6th day of June, A. D. 1913, present the Honorable William B. Sheppard, Judge, among the proceedings had were the following, to-wit:

Law. No. 200.

L. HILTON GREEN and W. A. FINLEY, JR., as Executors of the Estate of C. L. Wiggins, Deceased, Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant.

And now at this — cause came on again to be heard upon the issues the pleadings contained, and the said parties and their attorneys eing in court, and the said jury in its box, the said cause proeeded, and the said jury, after being instructed by the Court, retired consider of its verdict, and after due deliberation returned into urt and presented the following verdict, to-wit: Pensacola, Fla., ne 6th, 1913. We, the jury, find for the plaintiff in the sum of irty thousand, six hundred and forty-eight dollars ($30,648.00), th interest on this amount at the rate of 8 per cent per annum from e date this suit was first brought to date, with attorneys fees of 12½ r cent on principal and interest.

(Sgd.) FRANK MARSTON, *Foreman.*

Whereupon, it is considered, ordered and adjudged by the Court, at the plaintiffs, L. Hilton Green and W. A. Finley, Jr., as execus of the estate of C. L. Wiggins, deceased, do have and recover of d from the said defendant the Mutual Life Insurance Company New York, a corporation, the principal sum of thirty thousand, hundred and forty-eight ($30,648.00) dollars, together with inest thereon, at the rate of eight per centum per annum, from the e of the institution of said suit, to-wit, from the 21st day of May, D. 1910, to the date of this judgment, amounting to the sum of en thousand, four hundred and sixty-two and eighty-eight one ndredths ($7462.88) dollars, together with twelve and one-half 2½) per cent as attorneys fees, on the said principal sum and interest thereon, to-wit, the sum of four thousand seven hundred and sixty-three and eighty-six one hundredths (4763.86) dollars, the said several sums aggregating the sum of forty- thousand eight hundred and seventy-four and seventy-four one ndredths ($42,874.74) dollars, together with the costs of this se, hereby taxed at the sum of $—, and that the said plaintiffs have execution therefor.

And afterwards, to-wit, on the 10th day of June, A. D. 1913, came attorney for the defendant, and filed in the office of the clerk of court a petition for a writ of error to the United States Circuit rt of Appeals at New Orleans, La., which petition is in the words figures following, to-wit:

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In the United States District Court for the Northern District of Florida.

L. HILTON GREEN and W. A. FINLAY, JR., as Executors of the Estate of Cilbey L. Wiggins, Deceased, Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant.

To the Honorable William B. Sheppard, Judge:

The defendant feeling aggrieved by the verdict of the jury and the judgment of the Court and proceedings heretofore had in this case, petitions said Court for an order allowing a writ oferror to review said judgment to the United States Circuit Court of Appeals for the Fifth Circuit, under and according to the laws and practice in that behalf provided; and also that an order be made fixing the amount of security which the defendant shall furnish upon said writ of error, and that upon the giving of such security all further proceedings in said cause be suspended and stayed, until the determination of said writ of error, and petitioners will ever pray.

EMMETT WILSON AND
PHILIP D. BEALL,
Attorneys for the Defendant.

Indorsed: In U. S. District Court. Green, et al., Executors, vs. Mutal Life Insurance Co., a Corporation. Petition for Writ of Error. Emmett Wilson, Law Offices, Pensacola, Florida. Filed June 10, 1913. F. W. Marsh, Clerk.

96 Whereupon, the Judge of said Court made and caused to be entered of record an order allowing a writ of error, which was made and filed upon the 10th day of June, A. D. 1913, and is in the words and figures following, to-wit:

In the United States District Court for the Northern District of Florida.

L. HILTON GREEN and W. A. FINLAY, JR., as Executors of the Estate of Cilbey L. Wiggins, Deceased, Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant.

Upon motion of the defendant and presentation and filing of defendant's assignment of error, it is ordered that writ of error be and is hereby allowed for the review, by the United States Circuit Court of Appeals for the Fifth Circuit, of the judgment heretofore entered in the cause stated in the petition for the order allowing a writ of error; and that the amount of bond on said writ of error be

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and is hereby fixed at forty-five thousand dollars ($45,000), upon the giving of which bond all further proceedings in said cause shall be suspended and stayed until the determination of said writ of error by the Appellate Court.

This the 10th day of July, 1913.

WM. B. SHEPPARD, *Judge.*

Indorsed: In U. S. District Court. Green, et al., Executors, vs. The Mutual Life Insurance Company, Corporation. Order Allowing Writ of Error. Emmett Wilson, Law Offices, Pensacola, Florida. Filed June 10, 1913. F. W. Marsh, Clerk.

97 And afterwards, to-wit, on the 10th day of June, A. D. 1913, was filed in the office of the clerk of said Court, the assignment of errors, by the said plaintiff in error, which was in the words and figures following, to-wit:

In the District Court of the United States for the Northern District of Florida.

L. HILTON GREEN and W. A. FINLEY, as Executors of the Estate of Cilbey L. Wiggins, Deceased, Plaintiffs,

versus

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant.

Now comes the defendant and files the following assignments of error, which it will rely upon in the prosecution of the writ of error in this cause:

1. The Court erred in charging the jury in the oral charge in the following language:

"If Wiggins knew they were false, and that he made them with the fraudulent purpose of obtaining the policy of insurance, then such statements would avoid the policy and would serve as a good defense by the company; provided that the company at the time it accepted the application of the deceased as an insurance risk, had no knowledge of the falsity of the statements and representations made by Wiggins in his application for insurance."

2. The Court erred in charging the jury in the oral charge, in the following language:

"The law with regard to contracts of life insurance is, that the applicant, when required to state his condition, the condition of his health past and present, must state the facts as to all material inquiries truthfully and honestly. A material inquiry would be one concerning the truth of which *to* [it] would be important for the company to know, and "one likely to influence its action on the application for insurance, and if the applicant answers a material question untruthfully, with a fraudulent purpose, that is,
98 with intent to deceive the insurance company, such untruthful statement would avoid the policy.

Under the terms of the policy in this action, it is stipulated that

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all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties. Therefore, in the absence of fraud, no statement made by Wiggins in the application, though untrue, to any immaterial matter, would avoid the policy, and no false statement made by him which was not material to the inquiry, that is, which did not induce the company to issue the policy, or one which Wiggins did answer with fraudulent intent to procure the policy, can be relied on by the company as a defense to this action.

3. The Court erred in charging the jury in the oral charge, in the following language:

"But to avoid the policies on these grounds, you must find from the evidence that Wiggins made the false representations charged, and that he made them fraudulently; that they were material, and that there were in fact, illness, diseases of the heart, indigestion and a surgical operation, and that he had consulted physicians, and had certified that he had been examined by Dr. Tuberville."

4. The Court erred in charging the jury in the oral charge in the following language:

The contract of insurance in this case, as "expressed by the policies, embraces the statements and representations of Wiggins, the deceased, made to the agent, Hoge, or to Kilpatrick, or Turberville, the medical examiners."

5. The Court erred in charging the jury in the oral charge, in the following language:

"If you find from the evidence that the statements of Wiggins in the several matters inquired about his health and operation and treatment in a sanitarium were false, and further find that the agents, Hogue, and Torrey, and Tuberville, knew they were false, and —."

99 6. The Court erred in charging the jury in the oral charge in the following language:

"In determining whether the defendant knew the facts stated in the last given instruction, it is not necessary that you should find that any of the chief officers of the defendant so knew. It is only necessary that you should find that an agent whose knowledge would be the knowledge of the defendant company, did so know."

7. The Court erred in charging the jury in the oral charge in the following language:

"Then, the representations made by Wiggins in his application for insurance had been rejected; or whether he had been treated in a cure, sanitarium or hospital; or whether he had undergone a surgical operation; or whether he had had any illness or disease; or whether he had consulted a physician for "his health, to serve as a defense by the company to this action, depends upon whether such statements were knowingly false and fraudulently made."

8. The Court erred in charging the jury in the oral charge in the following language:

"If you find that Tuberville knew that he had not made an examination of Wiggins, or propounded any questions to him, and that Wiggins had misstated the facts when he certified that his answers

were correctly recorded by the medical examiner, then if you find from the evidence that Tuberville was such agent of the defendant company as to bind it by his, Tuberville's knowledge, and that the defendant knew of such false certificate, in that case the defense of the defendant, based upon the said alleged false representation, cannot be sustained. But if Wiggins knowingly signed the certificate in blank, which purported to contain the answers to the medical examination by Dr. Tuberville and before his answers had been inserted therein, it was a material representation and binding on him, and if false, would avoid the policy, unless the company through its medical examiner, Tuberville, had knowledge that the certificate was false, if it was signed by Wiggins in blank in collusion or under an express or tacit understanding with Tuberville that Wiggins was not to make the answers, then it would be such a false representation as to avoid the policy."

9. The Court erred in refusing to give the following instruction requested by the defendant:

"The defendant moves the Court to direct a verdict "in its favor, because:

1. The evidence shows without contradiction that Wiggins made false material statement in the application for insurance, relative to the fact of the consultation of physicians during the five years preceding the application.

2. Because the evidence shows without contradiction that Wiggins untruthfully stated in his application that he had not consulted a physician within five years next preceding the date upon which the application was made.

3. Because the evidence shows without contradiction that Wiggins untruthfully made the statement that he had not applied for insurance in any other company, which insurance had not been issued upon the plan and premium rate proposed.

4. Because it is shown without contradiction that Wiggins stated that he had never made application for insurance which had not been issued as applied for, and that no such application for insurance was then pending undisposed.

5. Because the evidence shows without contradiction that Wiggins falsely reported to the defendant that he had had no illness, disease or accident since childhood except pneumonia, from which he had recovered.

6. Because the evidence shows without contradiction that Wiggins stated in his application for insurance sued upon that he had not been in any asylum, cure, or hospital, when in truth he had within several months before the date of the making of said application been an inmate of a sanitarium, and had been operated upon in a sanitarium.

7. Because the evidence shows that Wiggins stated to the defendant in said application that he was in good health, when in fact it is shown that he was not in good health at the time of making said application.

8. Because the evidence shows without contradiction that Wiggins reported and certified to the defendant that he had been examined

by Dr. Kilpatrick and Dr. Tuberville upon this application for insurance, when in fact it is shown that Dr. Kilpatrick made only a partial examination and that Dr. Tuberville made no examination whatever."

10. The Court erred in refusing to give the following instruction requested by the defendant:

"The evidence in this case shows that the agent Hogue, who wrote the application and solicited the insurance which was issued to Wiggins, was not a regular or general agent of the Mutual Life Insurance Company, but was only an insurance broker; hence, the Court instructs you that Hogue's knowledge of the falsity of the representations, if any, made by Wiggins, is not chargeable to the defendant company, and it is not bound by such knowledge on the part of Hogue."

11. The Court erred in refusing to give the following instruction requested by the defendant:

"The Court instructs you that if you find from the evidence that the agent and medical examiners of the defendant company knew of the false representations, if any, made by Wiggins, and that they colluded with Wiggins to procure this insurance, then such "knowledge on their part is not chargeable to the defendant company, and it is not bound thereby."

12. The Court erred in refusing to give the following instruction requested by the defendant:

"The Court instructs you that if you find from the evidence that the agent and medical examiners who acted for the company in this instance knew of the falsity, if any, of the answers and representations made by Wiggins, and purposely failed to notify the
102 company of such falsity of said answers and representations, then they become the agents of Wiggins in the perpetration of this wrong, and the defendant company is not bound by their knowledge.

13. The Court erred in refusing to instruct the jury as requested by the defendant in the following requested charge:

"The Court instructs you that the agents and medical examiners of the defendant company may have known at the time the application was made that Wiggins had been in ill health and was in ill health at the time of the making of said application, but that such knowledge of such agent and medical examiners was not binding on the defendant insurance company unless it is further shown by the evidence that said agent or medical examiners, or one of them, notified the company at its home office or through a general agent, and such knowledge of said agent or medical examiners is not chargeable to the company unless it was so imparted to the company.

14. The Court erred in refusing to give the following instruction requested by the defendant:

"The Court instructs you that although the agent and medical examiners of the Mutual Life Insurance Company may have known at the time the application was made, that said Wiggins had consulted physicans, within five years next preceding the making of said application, that such knowledge of such agent or medical examiners

does not bind the defendant insurance company unless it is further shown that said agent or medical examiners notified the defendant company at its home office, or otherwise, in such manner that it reached the officers at the home office, and such knowledge of said agent or medical examiners is not chargeable to the company unless information thereof was so imparted to the company.

15. The Court erred in refusing to give the following instruction requested by the defendant:

"The Court instructs you that if you believe from the evi-
103 dence that Wiggins understood that two medical examinations were required by rule of the company, and that he certified to two examinations by separate physicians, and that the answers he made to each were correctly recorded, and you find further from the evidence that such certificates or statement by said Wiggins was untrue, and in fact that he had not been examined by two separate physicians, you will find for the defendant."

16. The Court erred in refusing to give the following instruction requested by the defendant:

"The Court instructs you that if you believe from the evidence that Wiggins certified to the defendant company that he had been examined by Dr. George C. Kilpatrick and that the said Kilpatrick had correctly recorded the answers, and that he had been examined by Dr. J. S. Tuberville, and that said Sr. [Dr.] Tuberville had correctly recorded his answers, and you find further that either one or both, of said doctors did not make such examination, you will find for the defendant."

17. The Court erred in refusing to give the following instruction requested by the defendant:

"The Court instructs you that the inquiry of the defendant contained in the application which Wiggins signed, with reference to the consultation of the physicians, was a material inquiry, and that if Wiggins falsely answered said inquiry, the policy is avoided and your verdict should be in favor of the defendant."

18. The Court erred in refusing to give the following instruction requested by the defendant:

"The Court instructs you that the inquiry contained in the application and signed by Wiggins, asking him if he was in good health, was a material inquiry, and if he answered said inquiry untruthfully the policies sued upon are thereby avoided, and you should find for the defendant."

104 19. The Court erred in refusing to give the following instruction requested by the defendant:

"The Court instructs you that the inquiry contained in the application for the insurance sued upon, asking Wiggins if he had undergone any surgical operation, was a material inquiry, and if he "answered said inquiry falsely the policies sued upon are avoided and of no effect, and you should find for the defendant."

20. The Court erred in refusing to give the following instructions requested by the defendant:

"The Court instructs you that the inquiry contained in the appli-

cation for insurance herein sued upon, asking Wiggins if he had ever been under treatment in any asylum, cure, hospital, or sanitarium, was a material inquiry affecting the risk, and if Wiggins answered same falsely the policies sued upon are avoided and of no effect, and you should find for the defendant."

21. The Court erred in refusing to give the following instructions requested by the defendant:

"The Court instructs you that the inquiry in the application, for this insurance, asking Wiggins if he had ever been examined for a policy in any other company or association which was not issued as applied for, was a material inquiry affecting the risk, and if Wiggins answered same falsely the policies are avoided and of no effect, and you should find for the defendant."

22. The Court erred in refusing to give the following instruction requested by the defendant:

"The Court instructs you that if you find from the evidence that Wiggins answered falsely a material inquiry contained in the application for this insurance or made a false statement of a material matter, and you find further that he made such false answers or statements carelessly or negligently, you must find that thereby
105 he committed a fraud on the insurance company, and the policies issued under the application are thereby "avoided and of no effect: In other words, if you find that Wiggins was grossly careless and negligent, in that he misrepresented material matters to the company, in law such conduct will be considered fraudulent and the policies sued on in this case are thereby avoided as above stated."

23. The Court erred in refusing to give the following instruction requested by the defendant:

"The Court instructs you that the medical examination attached to the application is a part of the application, and that the whole application in this case became a part of the contract of insurance and was incorporated in the several policies sued upon. Therefore, you are instructed that if Wiggins received the said policies and retained the same, he is presumed to have been familiar with the terms of said policies, including the statements and answers contained in the application. And further if you find from the evidence that he did receive said policies and retained the same, and that the application incorporated in said policies contained false answers or statements relative to material matters affecting the risk, then Wiggins is presumed to have ratified the statements and answers which were written in said application, whether they were truthful or untruthful, and if you find that they were false to material matters the plaintiffs cannot recover in this case and your verdict must be in favor of the defendant."

This the 10th day of June, A. D. 1913.

EMMET WILSON &
PHILIP D. BEALL,
Attorneys for Defendants.

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Indorsed: Northern District of Florida. United States District ourt. L. Hilton Green, and W. A. Finley, as executors of the tate of C. L. Wiggins, versus The Mutual Life Insurance Com- ny of New York, Defendant. Assignment of Errors. Filed this 9th day of June, 1913. Wm. B. Sheppard, Judge. Filed June 9th, 1913. F. W. Marsh, Clerk. For Defendants, Emmet Wilson nd Philip D. Beall, Attorneys, Pensacola, Fla.

96 And afterwards, to-wit, on the 10th day of June, A. D. 1913, the Judge of said Court made and caused to be entered record, an order allowing time for a bill of exceptions, which rder was in the words and figures following, to-wit:

the United States District Court for the Northern District of Florida.

HILTON GREEN and W. A. FINLAY, JR., as Executors of the Estate of Cilbey L. Wiggins, Deceased,

vs.

HE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant.

Upon application of the defendant in the above stated case, it allowed sixty (60) days from the date hereof for the presenta- n of its bill of exceptions in said case.

This the 10th day of June, 1913.

WM. B. SHEPPARD, *Judge*.

Indorsed: In U. S. District Court. Green, et al., Executors, vs. tual Life Insurance Company, a Corporation. Order Allow- g Time for Presentation of Bill of Exceptions. Emmett Wilson, w Offices, Pensacola, Florida. Filed June 10, 1913. F. W. arsh, Clerk.

And afterwards, to-wit, on the 10th day of June, A. D. 1913, e Judge of said Court made and caused to be entered of record, order on testimony, which is in the words and figures following, wit:

the District Court of the United States for the Northern District of Florida.

HILTON GREEN and W. A. FINLEY, Executors of the Will of C. L. Wiggins,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Upon application and cause shown: it is ordered that the testimony in the above stated case shall be put in the bill of exceptions in the form of question and answer, and not

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in narrative form, and that it so appear in the record of this case in the United States Circuit Court of Appeals for the Fifth Circuit.

Done and ordered this 10th day of June, A. D. 1913.

WM. B. SHEPPARD, *Judge.*

Indorsed: Green & Finlay vs. Mutual Life Ins. Co. Order That Testimony Shall be Put in Bill of Exceptions in Questions and Answers. Filed June 10, 1913. F. W. Marsh, Clerk.

And afterwards, to-wit, upon the 24th day of July, A. D. 1912, the Judge of said Court made and caused to be entered of record, an order on the exhibits filed in the cause, which order is in the words and figures following, to-wit:

In the District Court of the United States for the Northern District of Florida.

L. HILTON GREEN and W. A. FINLEY, Executors of the Will of C. L. Wiggins,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Upon application therefor and in the opinion of the Court that it is necessary and proper that the original exhibits attached to the depositions offered at the trial in this case should be inspected by the Court of Appeals on the writ of error herein, it is ordered that the clerk detach from the several depositions, the original exhibits and send them to the Court of Appeals, with the record herein, properly marked and identified with reference to the respective depositions to which they belong.

Done and ordered, at Pensacola, Florida, this 10th day of June, A. D. 1913.

WM. B. SHEPPARD, *Judge.*

Indorsed: L. Hilton Green and W. A. Finley, Executors of the Will of C. L. Wiggins vs. Mutual Life Insurance Company of New York. Order. Filed June 10, 1913. F. W. Marsh, Clerk.

108 And afterwards, to-wit, on the 14th day of June, A. D. 1913, came the defendant, and filed in the office of the clerk of said Court an agreement upon the papers to constitute the record on appeal, which agreement is in the words and figures following, to-wit:

In the District Court of the United States for the Northern District of Florida.

L. HILTON GREEN and W. A. FINLEY, Executors of the Will of C. L. Wiggins,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

It is agreed by and between the parties to the above stated cause, through their respective counsel, that the clerk, in the preparation

of the record in said cause of the pleadings of said cause, shall include:

1st. The transcript of the proceedings begun in the Circuit Court of Escambia County, Florida, and filed in this Court on July 4th, 1910, which transcript is composed of:

The plaintiffs' declaration.

The defendant's petition for removing said cause.

The bond of the defendant given upon said removal.

And the order of removal.

2nd. Plaintiffs' amendment to pleadings, filed December 1st, 1911.

3rd. The defendant's pleas, numbering 1 to 20, inclusive.

5th. Plaintiffs' replication, numbered 2, 3, 4, 5, 6, 7, 8, filed May 27, 1912, and rejoinders of defendant, except the first rejoinder.

6th. All papers and pleadings filed for the purpose and originating and perfecting the appeal in this cause, including the order of the District Court that the testimony of the witnesses shall be in form of question and answer, as given in this Court.

All other papers and pleadings, not specifically called for by this agreement, the clerk shall omit.

This 30th day of July, 1912.

BLOUNT & BLOUNT & CARTER,
Attorneys for Plaintiffs.
EMMETT WILSON AND
PHILIP D. BEALL,
Attorneys for Defendant.

Indorsed: Green, et al, vs. Mutual Life Ins. Co. Agreement of Counsel on Papers to be Included in Transcript and Order of Court Thereon. Filed June 14, 1913. F. W. Marsh, Clerk.

And afterwards, to-wit, on the 14th day of June, 1913, came the defendant, and filed in the office of the clerk of said Court, the supersedeas bond filed in the said cause, which bond is in the words and figures following, to-wit:

In the United States District Court for the Northern District of Florida.

L. Hilton Green and W. A. Finlay, Jr., as Executors of the Will of Gilbey L. Wiggins, Deceased, Plaintiffs,

The Mutual Life Insurance Company of New York, a Corporation, Defendant.

Know All Men by These Presents That we, The Mutual Life Insurance Company of New York, a corporation, as principal, and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto L. Hilton Green and W. A. Finlay, Jr., as executors of the will of Gilbey L. Wiggins, deceased, in the sum of fifty

thousand dollars ($50,000.00), lawful money, for the payment whereof well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Signed and sealed in triplicate this the 13th day of June, A. D. 1913.

110 The condition of the above and foregoing obligation is such that, whereas, the said L. Hilton Green and W. A. Finlay, Jr., as executors of the will of Cilbey L. Wiggins, deceased, did on the 6th day of June, A. D. 1913, in the United States District Court for the Northern District of Florida, obtain a judgment against the said Mutual Life Insurance Company of New York, a corporation, for the sum of thirty thousand six hundred and forty-eight dollars ($30,648.00), together with interest, attorneys' fee and cost, and that thereafter the said Mutual Life Insurance Company of New York obtained from said Court a writ of error to reverse the said judgment, and a citation has been directed to the said Green and Finlay, as executors aforesaid, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, La., on a day certain.

Now, therefore, if the said Mutual Life Insurance Company of New York, a corporation, shall well and truly prosecute its writ of error to effect and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, A CORPORATION. [SEAL.]

By EMMETT WILSON,

Att'y in Fact. [SEAL.]

UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]

[SEAL.] By HUNTER BROWN,

Att'y in Fact. [SEAL.]

Witness:

L. W. NELSON, *Attorney.* [SEAL.]

Taken and approved this the 14th day of June, A. D. 1913.

WM. B. SHEPPARD,

Judge U. S. District Court, Northern District of Florida.

(Original.)

111 Indorsed: In U. S. District Court. Green & Finlay, Executors, vs. The Mutual Life Insurance Company, a Corporation. Original. Supersedeas Bond. Emmett Wilson, Law Offices, Pensacola, Florida. Filed June 14, 1913. F. W. Marsh, Clerk.

And afterwards, to-wit, upon the 14th day of June, A. D. 1913, was filed in the office of the clerk of said Court the bill of exceptions in the said cause, which is in the words and figures following, to-wit:

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In the District Court of the United States for the Northern District of Florida.

L. HILTON-GREEN and W. A. FINLEY, JR., as Executors of the Estate of C. L. Wiggins, Deceased, Plaintiffs,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant.

Be it remembered, that on the 5th day of June, A. D. 1913, the above entitled cause came on to be tried before the above Court, and a jury impanelled, the Honorable William B. Sheppard, Judge, presiding, and the following proceedings were had:

A jury of twelve men were called and sworn in said cause on said date for trial of said cause.

And thereupon, the plaintiffs, after introducing in evidence the agreement of counsel for both parties, as to the amount of attorneys' fees to be found for the plaintiffs, in the event plaintiffs recovered, to-wit: That twelve and one-half per cent. of the amount recovered should be allowed plaintiffs' attorneys upon a recovery in the District Court, and in the event of an appeal, that six and one-quarter per cent. of the amount recovered should be allowed as the fee of plaintiffs' attorneys for services on the appeal, rested their case, after having stated the case to the jury and read the pleadings, which admitted the issuance of the policies, the death of the insured, and the right of the plaintiffs to sue as executors.

112 And thereupon, the defendant, to maintain the issues on its behalf, produced and examined the following witnesses:

Dr. J. S. TURBERVILLE, who being first duly sworn, testified as follows:

Direct examination:

Q. What is your name?
A. J. S. Turberville.
Q. What is your profession?
A. Practicing medicine.
Q. How long have you been practicing medicine?
A. Since 1902.
Q. Where do you live, doctor?
A. At Century, Florida.
Q. Where did you live on December, 1908?
A. At the same place, Century, Florida.
Q. How far is Century from Pine Barren?
A. I think it is about 15 or 20 miles; I am not sure.
Q. Did you know C. L. Wiggins in his lifetime?
A. Yes, sir; I knew him.
Q. Do you remember about the date of his death?
A. No, I can't recall the time of his death—I know the time I visited him, but I don't know the time of his death; it was some time

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afterward. It was about February 15th, 1910, but I don't remember the exact date.

Q. Doctor, I will ask you to examine this paper (counsel hands paper to witness)—is this your signature which is appended?

A. Yes, that is my signature.

Q. Is that the part of the paper which says "Medical Examiner's Report"?

A. Yes, sir.

Q. Is this your signature to the continuation of the report on the other side?

A. I think so—the first is I know, the last is I think, too—the balance is my writing.

Q. This purports to be an application to the Mutual Life Insurance Company by C. L. Wiggins, for insurance, a part of which is a medical examiner's report, which you say you signed; it appears
113 of date Pine Barren, Florida, 16th of December 1908; did you examine Mr. Wiggins doctor, as purported to be set forth here?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Did you fill in the answers to the questions as they are put in here?

A. Yes, sir.

Q. This paper purports to be signed by Cilbey L. Wiggins under the following words: "I hereby certify that my answers to the foregoing questions are correctly recorded by the medical examiner, "Cilbey L. Wiggins." Did you see Wiggins sign that?

A. No, sir.

Q. From what source or upon what information were you acting, if you did not examine Mr. Wiggins as this paper purports—when you filled in these answers?

A. That is a copy of the report of Dr. Kilpatrick's examination of Mr. Wiggins, and it was signed as a confirmation of his examination—to that understanding.

Q. Did you ever see Mr. Wiggins for the purpose of making an examination of him for life insurance?

A. No, sir.

Q. Then, Mr. Wiggins did not sign this examination in your presence?

A. No, sir.

Q. He answered no questions to you?

A. No, sir.

Q. Did you ever ask him any questions?

A. Not with respect to life insurance.

Q. What did you do with this report after you filled it in and signed it?

A. I gave it to one Mr. Hogue.

Q. Where did you give it to him?

A. In my office.

Q. At Century?

A. Yes, sir.

Q. Was this signature of C. L. Wiggins made before you received it?

A. I don't know.

Q. You don't remember?

114 A. No, sir.

Q. You can't say whether he signed this paper before it came into your hands or after it left your hands?

A. No, sir.

Q. You do know you made no examination of him?

A. The only part of the examination I did make was a urine examination from a specimen that was brought—that is the only part of the examination that I made.

Q. That is the only part of the examination you made?

A. Yes, sir; that is a correct examination of the specimen presented.

Q. Mr. Wiggins wasn't there?

A. No, sir.

Q. It was a specimen presented to you by whom?

A. I don't know whether it was by Mr. Hogue or Dr. Kilpatrick, it came along with the examination, that is all I know.

Cross-examination:

Q. I will ask you the circumstances, doctor, under which you signed this paper?

A. Mr. Hogue presented and asked me if I knew Dr. Kilpatrick well. I said I had worked with him. He asked me to sign this as a confirmation of Dr. Kilpatrick's report as to the examination; I am not sure whether he said—or whether it was an impression of mine, my understanding is—he said Dr. Kilpatrick was under age for life insurance examiner; that is, he was young in his profession; he had not practiced medicine but three years, and he wanted an examination for that reason; ordinarily life insurance physicians are accepted as examiners after they have practiced three years, and he simply wrote those answers and I copied them

Q. It was presented to you by Mr. Hogue?

A. Yes, sir.

Q. Was Dr. Kilpatrick present?

A. I can't recall whether he was or not—I believe he was there that day, because he and Dr. McLeod did come there for a previous examination—I can't be sure though.

Q. Whose examination was that?

A. Examination of a specimen of urine of Mr. C. L. Wiggins.

115 Q. Made when?

A. Just shortly before that.

Q. Where does Dr. McLeod that you speak of live?

A. At Bay Minette, Alabama.

Q. You say that Hogue presented it to you, and he told you it was a specimen of urine of C. L. Wiggins to be examined?

A. Yes, sir.

Q. Did he say anything to you about the necessity of more than one—the necessity or want of necessity, or someone besides Dr. Kilpatrick making the examination?

A. He said he wanted someone else—or something of that kind.

Q. Did he say he wanted you to examine Mr. Wiggins?

A. He did not.

Q. Did you know at the time of the necessity for a second examination of Mr. Wiggins?

A. No, sir; I did not.

Q. You said that you delivered this back to Mr. Hogue—it went from your possession to his?

A. Yes, sir.

And the defendant, further to maintain the issues in its behalf, offered in evidence the deposition of Dr. George C. Kilpatrick, which deposition was given upon commission duly issued by said Court, and filed and published in said cause, and which deposition, with the exhibits attached thereto, is in the words and figures following:

In the United States District Court for the Northern District of Florida.

L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of the Estate of Cilbey L. Wiggins, Deceased, Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant.

Depositions of Witness Produced, Sworn and Examined on the 4th day of June, A. D. 1912, at the office of J. M. Bonner, in the Town of Camden, in the State of Alabama, by virtue of the annexed commission issued out of the clerk's office of the
116 District Court of the United States for the Northern District of Florida, to me directed for the examination of said witness in a cause there depending between L. Hilton-Green and W. A. Finlay, Jr., as executors of the estate of Cilbey L. Wiggins, deceased, plaintiffs, and The Mutual Life Insurance Company of New York, a corporation, defendant, on the part of the defendant.

Dr. GEORGE KILPATRICK, of Pine Barren, Florida, being duly sworn, deposeth and answereth as follows, viz:

Direct interrogatories propounded by EMMET WILSON, attorney for defendant:

1.

Q. Please state you- name, age, occupation, and place of residence.

A. My name is Geo. C. Kilpatrick; my age is twenty-nine years; my occupation is a practicing physician, and my place of residence is Pine Barren, Florida.

2.

Q. Please examine photographic copy of application made by Cilbey L. Wiggins to the Mutual Life Insurance Company for in-

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surance in the sum of $30,648.00 in four policies of equal amounts, which is attached hereto, and dated at Pine Barren, Fla., Dec. 15, 1908, and state whether or not you made the examination therein reported under the heading "Medical Examiner's Report."

A. I have examined the photographic copy of the application made by Cilbey L. Wiggins to The Mutual Life Insurance Company for insurance in the sum of thirty thousand six hundred and forty-eight dollars ($30,648.00) in four policies of equal amounts, which photographic copy is attached to said interrogatories, and I did in part make the examination therein reported under the head "Medical Examiner's Report."

3.

117 Q. If you state in your answer to the previous question that you made the report referred to, state where you examined the said Wiggins, from whom you received the application, where you received same, to whom you delivered same after the examination, and where such delivery was made?

A. Such examination as I made was made in the office of C. L. Wiggins. I received the application from J. C. Hogue in my office, and delivered same after the examination to J. C. Hogue in my office, but such examination of C. L. Wiggins as was made by me was made after said report had been signed by me and delivered to J. C. Hogue.

4.

Q. Did you personally propound the question indicated in the said report to said Wiggins, and did he personally answer said question? If so, where did you make the examination and where were the answers given?

A. I did personally obtain from said C. L. Wiggins the information contained in my said medical examiner's report, but I did not propound the questions indicated in said report to C. L. Wiggins verbatim. This information was obtained by me prior to the date of said report, and was the result of various conversations with said C. L. Wiggins, had in various places, and covering a period of about eight months, during which time I had known C. L. Wiggins intimately.

5.

Q. How long previous to the examination which you made were you personally acquainted with C. L. Wiggins? At the time that you made the examination referred to, were you or not residing at Pine Barren, Florida, and in the employ of the company of which Mr. Wiggins was a owner or president? If so, how long were you with them, and how long had you personally known C. L. Wiggins?

A. I had been personally acquainted with said C. L. Wiggins about eight months previous to December 15th, 1908. On December 15th, 1908, I was residing at Pine Barren, Florida, and was not in the employ of the company of which Mr. Wiggins was president. I was never employed by said company, and, as already stated, I had know [known] Mr. Wiggins about eight months.

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118 6.

Q. In the medical examiner's report, which is a part of the application, a photographic copy of which is attached hereto and hereinbefore referred to, you propounded the following question to the said C. L. Wiggins, to-wit: "What illnesses, diseases, or accidents have you had since childhood?" to which he answered: "Pneumonia in the year 1899, which lasted thirty days, and from which he had completely recovered." You also asked the following questions as appears by said report, to-wit: "Have you stated in answer to Question 3 (*a*) all such illnesses, diseases, or accidents?" to which it appears that said Wiggins answered "Yes"; and "State every physician whom you have consulted in the past five years," to which the said Wiggins appears to have answered "None." Kindly state if you propounded said inquires as shown in said report, and if the said Wiggins answered said questions as shown in said report. If he qualified said answers in any respect, please state how. It also appears by Question 13 (*a*) in said report that you inquired of the said Wiggins as follows: "Have you ever been under treatment at any asylum, cure, or sanatarium?" to which said Wiggins answered "No." Did you propound said question and was the answer the same made by Wiggins, as stated in said report, without qualification?

A. At the date of said report I did not propound to said Wiggins the inquiries as shown in said report, and the said Wiggins did not answer same at the time, but as previously stated, I had obtained from said Wiggins the information contained in my report by reason of the various conversations with him above referred to, and my intimate acquaintance with him; prior to that date he had informed me of the pnuemonia as stated in the application. I also knew of his having had an operation for the removal of a wisdom tooth, all through his conversation with me, which operation was performed in a sanitarium in Montgomery, Alabama, a year or so previous. Said witness had told me of his operation at a Montgomery sanatarium, but, acting under the instructions of J. C. Hogue, I did not state this in my report.

7.

119 Q. Examine the photographic copy of the application referred to and state whether or not the said Wiggins signed your report at the bottom of the first page of the exhibit referred to under the following certificate: "I certify that my answers to the foregoing questions are correctly recorded by the medical examiner." (Signed) Cilbey L. Wiggins." If said Wiggins signed, as indicated on said exhibit, did he sign same in your presence and where?

A. I did not see the said C. L. Wiggins sign certificate referred to in said interrogatories, and I do not know that he signed same; however, I am familiar with his signature, and my best judgment is that it is his signature.

8.

Q. Forming a part of the said application, as shown by the photographic copy hereto attached, it appears to be dated "Pine Barren, State of Florida, the 15th day of December, 1908, witness, Geo. C. Kilpatrick, M. D." State if you so dated it yourself at Pine Barren, in the State of Florida, on the dated indicated.

A. I did sign my name to said report as shown by photographic copy hereto attached, but am not positive as to the exact date. My best recollection is that it was signed on December 15th, 1908, or one or two days subsequent thereto. It was signed in my office at Pine Barren, Florida.

9.

Q. Refer to the photographic copy attached hereto and state if that part of the application under the heading "Medical Examiner's Report," other than that which is printed, is in your handwriting?

A. Said medical examiner's report, as shown by photographic copy, other than that which is printed, is in my handwriting.

10.

Q. With regard to the application of C. L. Wiggins above referred to, did you ever consult, advise with, or communicate with any agent, inspector, or — of the Mutual Life Insurance Company, or
120 any person purporting to represent them, relative to the application of the said C. L. Wiggins and your examination of him, in any respect whatsoever, except one J. C. Hogue?

A. J. C. Hogue was the only agent of the Mutual Life Insurance Company that I ever consulted or advised with in regard to the application of C. L. Wiggins prior to the time of the death of said Wiggins, unless Dr. McLeod of Bay Minette, Alabama, and Dr. Turberville of Century, Florida, be considered agents of said company. I did discuss the matter with both of them.

11.

Q. Kindly state in detail any other matter or thing in your knowledge which may be pertinent to the issues in this case and material, which may be of benefit to either party in said suit.

A. On or about December 15th, 1908, I was not a regular examiner of The Mutual Life Insurance Company, and had never made an application for any insurance company. On or about December 15th, 1908, J. C. Hogue, who represented himself to be an agent of The Mutual Life Insurance Company, came to my office in Pine Barren, Florida, and told me that he wished to get me to make insurance examination of C. L. Wiggins; that it was not the custom of the company to appoint as medical examiners any physician who had practiced less than twelve months, but that he thought he could get me appointed. He said that Dr. J. C. McLeod had a short time previously examined Mr. Wiggins for The Prudential Life Insurance Company, which I knew to be a fact, and that in view of this exam-

ination it would not be necessary for me to actually examine Mr. Wiggins, and, relying upon his representations to me, I signed the medical examiner's report as shown by the photographic copy attached to these interrogatories without first seeing and examining Mr. Wiggins; but, as stated in my answer above, I had known Mr. Wiggins intimately about eight months, and from this acquaintance with him knew, in a general way, the facts to be as stated in said report. A day or two after this report was signed and delivered by me to J. C. Hogue, I saw Mr. Wiggins and made a partial examination of
121 him, examining his heart, and also made a urinary examination several times, microscopically and chemically, and found both apparently sound and all right.

Cross-interrogatories propounded by Messrs. Blount & Blount & Carter, attorneys for plaintiffs:

1.

Q. If you undertake to say, in answer to the third interrogatory propounded by the defendant, as to whom you received the application from, and where you received the same, to whom you delivered it after an examination of C. L. Wiggins, and where such delivery was made, please state whether you are absolutely certain in your recollection as to each of these particulars. If uncertain as to any of them, state as to which you are uncertain. When was the last time that you saw the application which purports to be signed by you and by the said Wiggins?

A. I am certain that I received said application from J. C. Hogue in my office and that I delivered same to J. C. Hogue in my office. The last time I saw the application was when I delivered it to J. C. Hogue.

Q. If you undertake to answer as to whether C. L. Wiggins signed the said application or not, state whether you did, or not, see him sign it, and whether you have, or not, absolute knowledge that he did sign it.

A. As stated in answering the direct interrogatories, I did not see C. L. Wiggins sign said application, and have not absolute knowledge that he did sign it.

3.

Q. If you undertake to state that you signed the following statement at the bottom of said application, to-wit: "Pine Barren, State of Florida, the 15th day of December, 1908, witness," please state whether you are certain that you signed it on the 15th day of December, 1908. Did you not sign it before or after said period? At the time that you signed it, had or had not the portion of said application preceding the words "Medical Examiner's Report," been filled out and signed by Wiggins or not? Do you remember with any certainty as to this fact?

122 A. As previously stated, I am not certain that the 15th of December, 1908, was the exact date my report was signed. It was signed about said time. My best recollection is that at the time

I signed it that portion of said application preceding the words "Medical Examiner's Report" had been filled out and signed by Wiggins.

4.

Q. Do you, or not, know of any of the transactions or communications between J. C. Hogue and C. L. Wiggins, with reference to the taking of life insurance in the defendant company, or with reference to the application and medical examiner's report? If so, state in detail what you know and what you hea-d [heard] each one of them say to the other, in this connection?

A. I did not know of my own knowledge of any transactions or communications between J. C. Hogue and C. L. Wiggins with reference to the taking of life insurance in the defendant company, or with reference to the application and medical examiner's report. I only know that I saw Hogue and Wiggins together more than once just about December 15th, 1908, and both of them told me that they were conversing about life insurance. I did not hear the conversation between them.

5.

Q. If you have said in answer to the interrogatories propounded by the defendant that you knew C. L. Wiggins prior to this examination, state whether or not you knew, prior to that time, that he had suffered from, and was, at the time of the application mentioned, suffering from, and had been treated for indigestion, and that, at the time of such application, he had been and was a sufferer from a weak and diseased heart, and that, at the time of said application, he had been a sufferer from and operated upon for a cyst in the jawbone. If you knew one of these things at said time, and not the others, state which one you knew, and how your knowledge of each was *divided*?

A. I know what *what* C. L. Wiggins had stated to me prior to December 15th, 1908, he had been operated on for a tooth im-
123 pacted in the jawbone, but I did not know that he had suffered or was then suffering from indigestion or a weak and diseased heart.

6.

Q. Did you, or not, know before and at the time of said application, that the said C. L. Wiggins had consulted physicians within five years next prior thereto? If so, state of what consultations you knew, and with what physicians they were had, and when and where?

A. I did not know that the said Wiggins had consulted any physician within five years next prior thereto, except for the above mentioned jawbone operation in a sanatarium at Montgomey, Alabama.

7.

Q. State whether or not, at the time of said application, you knew that said Wiggins has visited a cure in Hot Springs, Arkansas, in an effort to be relieved of ill health: If so, do you know from what ailment he sought relief at said place, and when he sought such relief?

A. At the time of said application I did not know that said Wiggins had visited a cure at Hot Springs, Arkansas, in an effort to be relieved of ill health other than in order to recuperate. I had heard him say that he had been to Hot Springs to recuperate.

8.

Q. Did you, or not, know at the time of the making of said application that the said Wiggins had been confined in a private hospital in the City of Montgomery, Alabama, and had been under treatment therein? If you did know, then state when he had been so confined, and of what ailment he was then suffering and was there confined?

A. I had heard said Wiggins say that he had been treated in a sanotarium in Montgomery, Alabama, for the above mentioned trouble with his jawbone, but do not remember how long he said he had been confined there

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9.

Q. Were you, or not, the George C. Kilpatrick who, in the month of November, 1908, signed a medical examiner's report upon an application made by C. L. Wiggins to the Prudential Life Insurance Company, such application being also signed by J. C. McLeod, M. D.?

A. I am the Geo. C. Kilpatrick who in the month of November, 1908, signed a medical examiner's report upon an application made by C. L. Wiggins to The Prudential Life Insurance Company.

10.

Q. Did you, or not, at the time of the application inquired about in the interrogatories propounded to you by the defendant, know that the said C. L. Wiggins had made applications to the Prudential Life Insurance Company for insurance upon his life, and that the said application to the Prudential Life Insurance Company had been denied or withdrawn, and had been disposed of, and that no policy had issued thereon?

A. At the time of said application I had heard that C. L. Wiggins had made application to The Prudential Life Insurance Company for insurance, and that same had been withdrawn, J. C. Hogue informing me that he had not been rejected for any physical defect, but that he was not passed on account of his residence in a district thought by that company to be infected with malaria.

11.

Q. State anything else that you may know to the benefit of the plaintiffs in this case?

A. I know nothing further that would benefit the plaintiffs in this case.

The above depositions were signed as follows:

"GEO. C. KILPATRICK, M. D."

Sworn to and subscribed before me this 4th day of June, 1912.

J. M. BONNER, *Commissioner.*"

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125 Indorsed: In the U. S. District Court, Nor. District of Fla. L. Hilton-Green, and W. A. Finlay, Jr., as executors of the estate of Cilbey L. Wiggins, Deceased, Plaintiffs, vs. The Mutual Life Insurance Company of New York, a corporation, defendant. Cross and direct interrogatories to be propounded to Dr. Geo. C. Kilpatrick. Filed May 30, 1912. Returned and filed in the office of the said clerk on June 7, 1912. F. W. Marsh, Clerk.

And the defendant, to further maintain the issues in its behalf, produced and had sworn the witness FRANK E. DEARING, who testified as follows:

Direct examination:

Q. What is your name?
A. Frank E Dearing.
Q. What is your business, Mr. Dearing?
A. I am superintendent of agents, State of Florida.
Q. Where do you live?
A. In Jacksonville.
Q. Are you acquainted with the Cecil Wilcox Agency?
A. Yes, sir.
Q. Do you remember in the course of your business, the policies issued to C. L. Wiggins for life insurance in December, 1908?
A Yes, sir.
Q. I will ask you if you saw, in the course of your business, the applications which were referred to in the pleadings and upon which the policies issued?
A. I did.
Q. Where did you see them?
A. I saw them in Jacksonville.
Q. Did they come into your hands in the course of your business as superintendent of agents and as connected with the agency?
A. Yes, sir.
Q. Do you know what became of these applications?
A. They were forwarded to the New York office.
126 Q. They were forwarded from Jacksonville to the New York office?
A. Yes, sir.
Q. Do you know whether, of your own knowledge, the policies of insurance were issued upon this application?
A. They were.
Q. Did you see the policies?
A. I did.
Q. Where did you see them?
A. At the Jacksonville office.
Q. Whence did they come—do you know?
A. From the New York office.
Q. You received these applications which were forwarded by you to the New York office, and you in turn, received back the policies from the New York office—for what purpose did you receive the policies?

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A. They were sent there from the home office for delivery to the Florida agent.

Q. Now, this particular piece of business, what was your first knowledge of it and where did you first hear of it?

A. I received a long distance telephone message from New Orleans from agent Torrey, asking authority to write some business in Florida.

Q. Asking authority from whom?

A. From the Jacksonville agency.

Q. Did you grant the authority?

A. We did.

Q. And thereafter you received the application as stated?

A. Yes, sir.

Q. Do you know whether or not the premium that was paid on this insurance went through your office to the home office?

A. It was reported through our office—yes, sir.

Q. Did you send the amount to the home office—you had to send it or make a report on it?

A. Yes, we collected the net premium from the agent and remitted to the home office.

Q. You got the premium from the gentleman who asked permission to write the insurance, Mr. Torrey?

A. Yes.

Q. Do you know one J. C. Hogue?

A. I do not.

Q. As superintendent of agents, does your line of duty
127 make you familiar with the line of agents doing business in Alabama and Florida?

A. No, not in Alabama, only in Florida.

Q. As I understand it, the business done in Florida—or this case, rather, that we are talking about, was done after permission gotten from the Jacksonville office, as superintendent of agents?

A. Yes, sir.

Q. Do you know Hogue?

A. I know of him.

Q. Did you know him before this suit?

A. I never heard his name before.

Q. Was he authorized from your office to do business as an agent?

A. No.

Q. Then your knowledge and information of him came subsequent to the death of Mr. Wiggins?

A. Yes, sir.

Cross-examination.

By Mr. BLOUNT:

Q. I understood you to say, Mr. Dearing, your long distance telephone message came from New Orleans?

A. Yes, sir.

Q. Came from Mr. Torrey?

A. Yes, sir.

Q. What Torrey was that?
A. D. J. Torrey.
Q. Was he the agent of the company at New Orleans?
A. He was the agent at Mobile and Southern Mississippi and had been formerly agent at Pensacola.
Q. He was not then agent at New Orleans, but just temporarily there?
A. I presume so.
Q. He was manager for the company at Mobile, was he not?
A. No, sir; he was a sub-agent.
Q. Was he, or not, authorized to use the name of manager?
A. Well, he may have used the name, but the manager of Alabama is Mr. J. S. Wilcox, of Montgomery, Alabama.
Q. Was he authorized to use the name of manager?
128 A. I am unable to say.
Q. Didn't his signature appear on that paper which passed through your hands, showing that he was manager, and didn't he stamp that on these papers?
A. I am unable to say as to that, sir.
Q. Please look at those two—and say whether or not those are the two applications which passed through your hands?
A. Yes, sir; they are the applications.
Q. How does Mr. Torrey sign his name?
A. J. D. Torrey, soliciting agent.
Q. He signs himself that way?
A. Yes, sir.
Q. Signs everything that way?
A. Yes, sir.
Q. Look at that? (Counsel hands original application and medical examiner's reports attached to the deposition of W. J. Easten.)
A. J. D. Torrey, manager.
Q. He signs it "J. D. Torrey, Manager," does he?
A. Yes, sir.
Q. Then, if you had inspected this carefully you would have seen that he was representing himself as manager at Mobile?
A. Yes, sir.
Q. Are you familiar with his signature?
A. Yes, sir.
Q. Is this his signature to this (handing to the witness original application and medical examiner's reports attached to deposition of W. J. Eastman)?
A. Yes, sir; I should say they were.
Q. What was the purpose of Torrey putting his signature to that application at all?
A. I should say so we would know it was his business.
Q. In order that you should know that it had passed through his hands at Mobile, Alabama?
A. No, sir; as agent for our company—he was agent for Mobile and Southern Mississippi.
Q. He was agent for Mobile and Southern Mississippi?
A. Yes, sir.

Q. Did he present this with authority or without authority?
A. He was manager at Mobile. I can't tell what authority he had from the manager at (of) Alabama.
129 Q. He was the one who transmitted to you these applications, was he not?
A. Yes, sir.
Q. Did the applications from Alabama always come through him?
A. We did not receive applications from Alabama.
Q. You did not receive applications from Alabama?
A. No, sir.
Q. You authorized him, however, specially to do this business from Florida?
A. Yes, sir.
Q. You knew he was in Alabama?
A. He was in Florida.
Q. He came from Alabama to Florida?
A. I am unable to say.
Q. You don't know where he was when he sent this?
A. I don't.
Q. Did you receive subsequently from Torrey the premiums upon these policies?
A. Well, we made drafts upon him for the net premium.
Q. Did you draw upon him at Mobile or Pensacola?
A. At Mobile.
Q. You knew, then, that he was at Mobile, and you got the premiums from Pensacola?
A. He instructed us to draw on him at Mobile.
Q. Do you know where the premiums received were paid?
A. I do not.
Q. Do you know where the policies were delivered?
A. I do not.
Q. You only know you received the money by draft on Torrey at Mobile and that you sent these policies to be delivered by Mr. Torrey at Mobile?
A. I don't know to whom they were sent; I am unable to say to whom and where they were sent.
Q. You don't know to whom, nor where they were sent?
A. No.
Q. You don't know anything that occurred with reference to these policies after they reached your office and you saw them there?
A. No.
130 Q. You are entirely ignorant as to where the premium was paid?
A. I am.

Redirect examination:

And the defendant, further to maintain the issues in its behalf, offered in evidence the deposition of Dr. C. A. THIGPEN, which deposition was given under commission duly issued by said Court, and

filed and published in said cause, and read to the jury, and which deposition, with the following exhibit attached thereto, is in the words and figures following.

In the United States Circuit Court for the Northern District of Florida.

L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of the Estate of Cilbey L. Wiggins, Deceased, Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY, OF NEW YORK, a Corporation, Defendant.

Deposition of witness, Dr. CHARLES A. THIGPEN, produced, sworn, and examined on the 8th day of May, A. D. 1911, at the City of Montgomery, in the State of Alabama, by virtue of the annexed commission, issued out of the clerk's office of the Circuit Court of the United States for the Northern District of Florida, to me directed, for the examination of the said witness, in a cause there pending between L. Hilton Green and W. A. Finley, Jr., as executors of the estate of Cilbey L. Wiggins, deceased, and The Mutual Life Insurance Company of New York, a corporation, on the part of the defendant.

CHARLES A. THIGPEN, being duly sworn, deposeth and answereth as follows, viz.:

Direct interrogatories to be propounded to Dr. Chas. A. Thigpen, a material witness for the defendant. Emmett Wilson, Attorney for Defendant:

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1.

Q. What is your name, occupation and place of residence?
A. My name is Charles A. Thigpen; I am an eye, nose, ear and throat specialist, and reside at #1200 South Perry Street, in the City of Montgomery, Alabama.

2.

Q. Did you or not know Cilbey L. Wiggins in his lifetime?
A. I did know C. L. Wiggins in his lifetime.

3.

Q. If you state in answer to the first question that you are a physician and surgeon, please state whether or not you were ever consulted as such physician or surgeon by Cilbey L. Wiggins concerning his health in any respect? If yea, please give the date of such consultation or consultations?
A. I was consulted by C. L. Wiggins on July 16th, 1907.

4.

Q. Please state whether or not you ever performed a surgical operation on Cilbey L. Wiggins? If yea, state the nature thereof, and the date when it was performed?

A. The nature of the operation was cystic enlargement of the lower jaw, due to an impacted wisdom tooth.

5.

Q. Please state whether or not you ever treated Cilbey L. Wiggins while said Wiggins was an inmate of any sanatarium or hospital? If yea, please give the date and the name of such sanatarium or hospital, and the place where it is situated?

A. The operation was performed while C. L. Wiggins was at Highland Park Sanitarium.

6.

Q. If you state in answer to the above questions or any of them that you treated Cilbey L. Wiggins, or operated on him, please
132 state if you know where Wiggins resided or where his home was at that time?

A. C. L. Wiggins resided at Pine Barren, Florida.

7.

Q. If in answer to the above questions or any one of them you have stated that you operated on Cilbey L. Wiggins, please state for what the operation was performed, and fully and in detail the circumstances surrounding same; also who assisted in such operation if there was an operation, and if there was any assistance?

A. The operation was performed for the aforesaid trouble I have just mentioned; associated with which (this trouble) was severe neuralgia, pain in the jaw, and right side of the head, and Doctor I. L. Watkins gave the anesthetic and my associate, Dr. W. G. Thigpen, assisted in the operation. The jawbone was opened and the whole tooth removed. I found the tooth had grown down the wrong way; instead of growing upward, it grew downward and forward, and came in contact with the tooth in front of it, and caused the enlargement of the bone and the pain. The operation was done at Dr. Watkins' infirmary, Highland Park Sanitarium.

8.

Q. If in answer to the above questions or any one of them you state that you operated on Cilbey L. Wiggins, and that such operation was performed at a sanitarium or hospital, please state how long said Wiggins was confined in said sanatarium or hospital, and how long treated by you?

A. C. L. Wiggins was confined in the hospital for ten days, and was under my direct care from July 16th, 1907, to August 13th,

1907, during which time he was at some hotel in the city. I think it was the Exchange Hotel, and was under my supervision for about three months.

9.

Q. If in answer to the above question or any one of them you have stated that you were consulted by Cilbey L. Wiggins as to his health, please state whether or not of your own knowledge said Wig-
133 gins consulted with you, or separately, any other physician or surgeon regarding his health about the same time that he consulted you?

A. I do not know whether he consulted any physician or not. I was only the physician as to the local trouble; as to his general health, I was never consulted. I know he did not consult Dr. Watkins. Dr. Watkins only gave the anesthetic for me at the time of the operation.

10.

Q. If in answer to the above questions or any one of them you state that you operated, or assisted in the operation on Cilbey L. Wiggins, please state fully and in detail the circumstances attending such operation? State whether or not an anæsthetic was used?

A. Yes, ether.

11.

Q. If in answer to the question next above you state that you operated or assisted in the operation on Cilbey L. Wiggins, and you have stated that an anæsthetic was given, please state what effect the anæsthetic had on the patient's heart? State whether or not there was any *i*sual effect? State whether or not you examined the patient's heart? If yea, what was its condition?

A. Nothing unusual, just the ordinary effect of the anesthetic. He took it nicely, I remember that much. Had no unusual effect. I did not examine his heart. I do not remember whether Doctor Watkins examined the heart before giving the e*i*ther [ether] or not. I did not.

12.

Q. If in answer to the above question you state that you operated or assisted in the operation on said Wiggins, and that an anæsthetic was administered, please state who administered the anæsthetic? Please state what effect the anæsthetic had on the patient's heart?

A. D. J. L. Watkins. Nothing unusual; ordinary effect of ether used as an anæsthetic.

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13.

Q. If you state that you were consulted by Cilbey L. Wiggins regarding his health, please state in detail, if you made an examination of him, what his physical condition was, and especially with reference to the condition of his heart?

A. I did not examine his general condition only for my speci work. I did not make a physical examination of him. I did n know as to the condition of his health generally.

14.

Q. State anything else that you may know upon the subject i quired about, and which may be material and of benefit to eith party to this suit?

A. I know nothing other than I have given.

C. A. THIGPEN.

Sworn to and subscribed before me, the 10th day of May, 191

WARREN S. REESE, *Commissioner*. [L. S.]

On the 27th day of April, A. D. 1911, Messrs. Blount & Blount Carter, attorneys for plaintiffs, acknowledged in writing receipt of copy of the within direct interrogatories, but did not file any cros interrogatories, or in anywise object to the taking of the said depos tion, or to the commissioners thereby appointed.

Indorsed: L. Hilton Green and W. A. Finley, Jr., as executors o the estate of Cilbey L. Wiggins, Plaintiffs, vs. The Mutual Life In surance Company of New York, a Corporation, Defendant. Depos tion of Dr. C. A. Thigpen. Filed May 11, 1911. F. W. Marsh Clerk.

135 And the defendant, further to maintain the issues in it behalf, offered in evidence the deposition of J. M. DANNELLY which deposition was given upon commission duly issued by sai Court, and filed and published in said cause, and read to the jury and which deposition, with the exhibits attached thereto, is in th words and figures following:

In the United States Circuit Court for the Northern District of Florida.

L. HILTON GREEN and W. A. FINLAY, JR., as Executors of the Estate of Cilbey L. Wiggins, Deceased, Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant.

Deposition of Witness, Produced, Sworn, and Examined on the 20th day of June, A. D. 1911, at my office in the First National Bank Building, in Montgomery, Montgomery County, Alabama, by virtue of the annexed commission, issued out of the clerk's office of the Circuit Court of the United States for the Northern District of Florida, to me directed, for the examination of said witness in a cause there depending between L. Hilton Green and W. A. Finley, Jr., as executors of the estate of Cilbey L. Wiggins, deceased, are plaintiffs, and The Mutual Life Insurance Company of New York, a corporation, is defendant, on the part of the defendant.

Direct interrogatories to be propounded to J. M. DANNELLY, a material witness for the defendant, Emmett Wilson, attorney for defendant:

J. M. DANNELLY, of Montgomery, Montgomery County, and State of Alabama, being duly sworn, deposeth and answereth as follows, viz.:

1.

Q. State your name, age, occupation and place of residence?

A. My name is J. M. Dannelly; I am 55 years of age; I am a minister of the Gospel; and reside at 22 Scott Street, Montgomery, Montgomery County, Alabama.

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2.

Q. Did you know Cilbey L. Wiggins of Pine Barren, Florida, in his lifetime?

A. Yes, I knew Cilbey L. Wiggins, of Pine Barren, Florida, in his lifetime.

3.

Q. Did you or not know said Wiggins in July, 1907? If yea, did you or not see said Wiggins during July or August, 1907? If so, where?

A. I did know said Wiggins in July, 1907. I did see said Wiggins in Montgomery, Alabama, but do not recall exact date, but it was while he was in Montgomery, Alabama, under treatment of Dr. Thigpen, for an operation on his tooth or jawbone. I saw him several times during his stay here.

4.

Q. If in answer to the next preceding question you state that you saw said Wiggins at Montgomery, Alabama, in July, 1907, state whether or not said Wiggins was well or unwell. If you state that he was unwell, state whether or not you conversed with him relative to his physical condition. If yea, state whether or not said Wiggins complained of being unwell, and in what particulars. Please answer fully and in detail?

A. Said Wiggins stated that he was unwell at that time and I visited him in his room at the hotel. He said that he was suffering from dyspepsia and feared his heart was not sound. I visited him several times and during his stay here and in conversation with him during these visits he made the above statements.

5.

Q. State any other matter or thing which may be material to the issues of this case, and of benefit to either party to this suit.

A. (No answer.)

(Signed) J. M. DANNELLY.

Sworn to and subscribed before me, this the 20th day of June, 1911.

J. R. THOMAS,
Commissioner.

137 A copy of the said direct interrogatories was served on the said Messrs. Blount & Blount & Carter.

The said deposition was returned and filed with the following indorsements: In the United States Circuit Court, Northern District of Florida. L. Hilton Green & W. A. Finley, Jr., as Executors of the Estate of Cilbey L. Wiggins, Deceased, Plaintiffs, vs. The Mutual Life Insurance Company of New York, a Corporation, Defendant. Filed June 21, 1911. F. W. Marsh, Clerk.

On direct interrogatories, indorsed: "No cross-interrogatories."

BLOUNT & BLOUNT & CARTER,
Att'ys for Pl'ff.

And the defendant to further maintain the issues in its behalf, offered in evidence the deposition of Dr. W. P. Dey, which deposition was given upon commission duly issued by said Court, and filed and published in said cause, and read to the jury, and which deposition, with the exhibits attached thereto, is in the words and figures following:

In the United States Circuit Court, Northern District of Florida.

L. HILTON GREEN and W. A. FINLEY, JR., as Executors of the Estate of C. L. Wiggins, Deceased, Plaintiffs,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.

Deposition of Witness Produced, Sworn and Examined on the 12th day of May, A. D. 1911, at the City of Jacksonville, in the State of Florida, by virtue of the annexed commission issued out of the clerk's office of the Circuit Court of the United States for the Northern District of Florida, to me directed, for the examination of the said witness in the cause there pending between L. Hilton Green and W. A. Finley, Jr., as executors of the estate of C. L. Wiggins, deceased, and Mutual Life Insurance Company of New York, on the part of the defendant.

138 Dr. W. P. DEY, of Jacksonville, Duval County, Florida, being duly sworn, deposeth and saith as follows, namely:

Direct interrogatories to be propounded to Dr. W. P. Dey, of 25 West Church Street, Jacksonville, Florida, a material witness for the defendant:

Direct interrogatories by Mr. Wilson, attorney for defendant:

1.

Q. State your name, age, occupation and place of residence. If you state that you are a physician, state how long you have been a practicing physician?

A. My name is W. P. Dey, I am thirty years old, and a physician. I live at 25 West Church Street, Jacksonville, Florida, and have practiced my profession since 1904, seven years.

2.

Q. Were you or not residing during the years 1907 and 1908 at Pine Barren, Florida? If yea, were you in the service at the time of the McMillan Lumber Co.? Did you or not know Cilbey L. Wiggins?

A. I lived at Pine Barren, Florida, during 1907, and until September, 1908. I was not in the service of the McMillan Lumber Company.

3.

Q. State, if in answer to the next above question you stated that you knew Cilbey L. Wiggins of Pine Barren, Florida, when you met him, and how long you resided at Pine Barren, Florida?

A. I knew Cilbey L. Wiggins. I met Mr. Wiggins in 1904 at Century, Florida. I resided at Pine Barren, Florida, about two years.

4.

Q. Did you or not during your residence at Pine Barren,
139 Florida, in your capacity as a practicing physician treat the said Wiggins for any disease or diseases or physical infirmaties, if yea, state for what disease, diseases, or infirmaties you treated him while resident there, giving the date thereof as near as possible?

A. I treat- C. L. Wiggins for fracture of a bone of the right hand, and also for some diseased condition of his lower jaw.

5.

Q. Did you or not during your residence at Pine Barren, Florida, treat said Wiggins during the years 1907 and 1908 for indigestion? If yea, state as near as you can how many times you treated him for indigestion and the approximate date?

A. I never treated C. L. Wiggins, as far as I can remember, for indigestion.

6.

Q. Did you or not during the summer of 1907 treat said Wiggins for a period of about three months for what was thought to be neuralgia in the head? Answer fully and in detail?

A. During the summer of 1907 I treated C. L. Wiggins for what was thought to be neuralgia in the head. I was not certain what it was. In fact, I did not know what the condition was, and called in an eye, ear, nose and throat specialist, Dr. F. M. Thigpen, of Pensacola, Florida. He did not know what it was. I advised Mr. Wiggins thinking it was neuralgia possibly due to malaria, although I never found any malarial parasites in his blood, to go to Hot Springs, Arkansas, which he did. His neuralgia, or the pain in his head continued, and he went, I think, to Atlanta, Georgia. From Atlanta he came back to Pine Barren, and then he and I went to Montgomery, Alabama, and consulted Dr. Charles Thigpen, who decided to cut into the lower jaw to see what the troube was. He found it to be a tooth in the interior of the bone.

7.

Q. Did you or not during the summer of 1907, or at any
140 other time while you were a practicing physician at Pine Barren, Florida, advise said Wiggins to visit any cure or sanatarium for the benefit of his health. If yea, what was such advice, and state whether or not said Wiggins visited any such place upon your advice in search of health?

A. The only time I ever advised Mr. Wiggins to visit a sanatarium was the time that I asked him to go to Hot Springs, for this condition of his face.

8.

Q. State whether or not said Wiggins visited Hot Springs, Arkansas, during the summer of 1907, or any other place upon your

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advice that his physical condition was such that he should seek relief in such place?

A. I sent him to Hot Springs, as stated, in the hope that it would do that condition in his face some good, for I did not know what it was and no one else could find out what it was up to that time. That was before the operation.

9.

Q. State whether or not during the summer of 1907, or any other time while you were the physician of the said Wiggins, the said Wiggins visited and consulted Dr. Calhoun of Atlanta, Georgia, for advice as to his physical condition. If yea, state if you know for what he consulted Dr. Calhoun?

A. In the summer of 1907 Mr. Wiggins consulted Dr. Calhoun, of Atlanta, Georgia, for this supposed neuralgia of his face. Dr. Calhoun advised an exploratory incision into the jaw to try to locate the cause of the trouble.

10.

Q. State whether or not said Wiggins visited and was operated upon in a hospital or sanitarium in Montgomery, Alabama, during the summer of 1907, or at any other time while you were resident at Pine Barren, Florida. If yea, state what hospital he visited, and whether or not he was operated upon?

A. See answer to the sixth interrogatory. He was at Dr. Watkins' sanitarium in Montgomery, Alabama.

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11.

Q. If you state in answer to the next above question that Wiggins was operated on in a sanitarium or hospital in Montgomery, did you or not have anything to do with said operation? Who performed the operation, and how long did said Wiggins remain in said hospital? State fully and in detail?

A. Yes, Mr. Wiggins was operated on in Dr. Watkins' infirmary in Montgomery, Alabama, by Dr. Charles Thigpen, assisted by myself. Incision was made into the lower jawbone after having extracted one of the molar teeth, part of the jawbone was chiseled off, and a tooth was discovered, which was also extracted, the cavity scraped, the wound packed. Mr. Wiggins was in the hospital about ten days or two weeks. The wound healed fully in about four weeks.

12.

Q. State any other matter or thing which may be material and of benefit to either party to this suit?

A. —.

H. P. DEY.

Sworn to and subscribed before me this 12th day of May, A. D. 1911.

J. T. G. CRAWFORD, [L. S.]
Commissioner.

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Cross-interogatories to be propounded to Dr. W. P. DEY, a witness for defendant, by Messrs. Blount & Blount & Carter, Attorneys for plaintiffs:

1.

Q. If you say, in answer to the seventh interrogatory, that C. L. Wiggins visited any cure or sanitarium, for the benefit of his health, state whether or not you accompanied him to such place; whether you were at such place while he was there? State your means of knowledge fully?

A. I did not accompany C. L. Wiggins to any cure or sanitarium which he visited for the benefit of his health, except to Montgomery, Alabama.

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2.

Q. If you say, in answer to the eighth interrogatory, that C. L. Wiggins visited Hot Springs, Arkansas, for the benefit of his health, state whether or not you accompanied him to such place; whether you were at such place while he was there. State your means of knowledge fully?

A. I did not accompany C. L. Wiggins when he visited Hot Springs, Arkansas, for the benefit of his health, and my only means of knowledge that he was at Hot Springs, Arkansas, was derived through conversations with his wife about his condition.

3.

Q. If you say that the said Wiggins visited and consulted Dr. Calhoun of Atlanta, Georgia, for advice as to his physical condition, state whether or not you accompanied him to such place, and whether you were at such place while he was there. State your means of knowledge fully?

A. I did not accompany C. L. Wiggins when he visited and consulted Dr. Calhoun, of Atlanta, Georgia, and my only means of knowledge as to his having been there was through conversations with said Wiggins afterwards.

4.

Q. If you say that the said Wiggins visited, and was operated upon, in a sanitarium in Montgomery, Alabama, state whether or not you accompanied him to such place; whether you were at such place while he was there. State your means of knowledge fully?

A. I accompanied C. L. Wiggins when he visited Montgomery, Alabama, and was present and assisting when he was operated on there.

5.

Q. State any other matter or thing which you may know to the benefit of the plaintiffs?

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A. I do not know of any other matter or thing which might to the benefit of plaintiff.

W. P. DEY.

Sworn to and subscribed before me this 12th day of May, A. D. 1911.

J. T. G. CRAWFORD, [SEAL.]
Commissioner.

ndorsed: In the United States Circuit Court, Northern District Florida. L. Hilton Green and W. A. Finley, Jr., as executors the estate of C. L. Wiggins, Deceased, Plaintiffs, vs. Mutual Life urance Company of New York, Defendant. Depositions. From T. G. Crawford, Jacksonville, Florida. Filed May 17, 1911. W. Marsh, Clerk.

And the defendant, further to maintain the issues in its behalf, red in evidence the deposition of Dr. J. B. Elliott, which depo- on was given upon commission duly issued by said Court, and l and published in said cause, and read to the jury, and which osition, with the exhibits thereto attached, is in the words and res following:

the United States Circuit Court for the Northern District of Florida.

HILTON GREEN and W. A. FINLAY, JR., as Executors of the Estate of Cilbey L. Wiggins, Deceased, Plaintiffs,
vs.
E MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant.

osition of Witness, Produced, Sworn, and Examined on the 3rd day of May, A. D. 1911, at the City of New Orleans, in he State of Louisiana, by virtue of the Annexed Commission, ssued out of the Clerk's Office of the Circuit Court of the United tates for the Northern District of Florida, to me Directed, for he Examination of the said Witness in a Cause there Depending etween L. Hilton Green and W. A. Finlay, Jr., as Executors f the Estate of Cilbey L. Wiggins, Deceased, Plaintiffs, and he Mutual Life Insurance Company, of New York, a Cor- oration, Defendant, on the part of the Defendant.

Dr. J. B. ELLIOTT, JR., of Morris Building, New Orleans, Louisiana, being duly sworn, deposeth and answereth as fol- , viz:

irect interrogatories to be propounded to Dr. J. B. Elliott, Jr., Morris Building, New Orleans, Louisiana, a material witness for defendant. Emmett Wilson, Attorney for Defendant:

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1.

Q. State your name, age, occupation and place of residence. If you state that you are a physician, state how long you have been a practicing physician?

A. John Barnwell Elliott, Jr., 40 years, physician, 1423 Louisiana Avenue, New Orleans, La., and have been a physician seventeen years.

2.

Q. Did you or not visit professionally Cilbey L. Wiggins of Pine Barren, Florida, during his last illness in the month of March, 1910? If yea, please state of what disease said Wiggins died?

A. I visited Mr. Wiggins, of Pine Barren, Florida, in March, 1910. He died of Myocarditis.

3.

Q. If you state that you visited Wiggins in his last illness, please state whether or not you made an examination of him to ascertain his physical condition. If yea, please state what that condition was according to your diagnosis?

A. I examined Mr. Wiggins throughly on each of my five separate visits to him. According to my diagnosis he had inflammation of the myocardium.

4.

Q. If you made such examination, state whether or not you found that the said Wiggins' heart was affected. If yea, from the examination state, if you are able to do so, whether or not
145 the diseased condition of Wiggins' heart, if you found it diseased, was of recent origin or chronic. Please answer fully and specifically with special reference to the condition of the heart?

A. His heart was affected. I cannot say how long it had been affected. Myocarditis is a disease of the heart muscle, very hard to diagnose in its early stages, and, in this case, it is impossible for me to say how long it had been existing before my visits.

5.

Q. State any other matter or thing which may be material and of benefit to either party to this suit?

A. To the best of my recollection the patient had been sick only three months, judging by the history given me.

JNO. B. ELLIOTT, JR. [SEAL.]

Sworn to and subscribed before me the 23rd day of May, A. D. 1910.

EDWARD RIGHTER,
Notary Public, Commissioner.

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Indorsed on direct interrogatories: We hereby acknowledge receipt of a copy of the within interrogatories, this the 6th day of May, 1911.

BLOUNT & BLOUNT
& CARTER,
Attorneys for the Plaintiff.

No cross-interrogatories filed.

Indorsed: Law Office of Edward Rightor, New Orleans, La. J. B. Elliott. Filed — 26, 1911. F. W. Marsh, Clerk.

146 And the defendant, further to maintain the issues in its behalf, offered in evidence the deposition of Dr. Robert L. Burrage, which deposition was given upon commission duly issued out of said Court, and filed and published, in said cause, and read to the jury, and which deposition, with the exhibits thereto attached, is in the words and figures following:

In the United States Circuit Court for the Northern District of Florida.

L. Hilton Green and W. A. Finlay, Jr., as Executors of the Estate of Cilbey L. Wiggins, Deceased, Plaintiffs,
vs.
The Mutual Life Insurance Company of New York, a Corporation, Defendant.

Deposition.

The deposition of Doctor L. Burrage, a witness produced, sworn, and examined on the ninth day of May, A. D. nineteen hundred and eleven, at the office of Horace C. Grice, Prudential Building, Newark, in the State of New Jersey, by virtue of the annexed commission, issued out of the clerk's office of the Circuit Court of the United States, for the Northern District of Florida, to me directed for the examination of the said witness in a cause therein depending between L. Hilton Green and W. A. Finlay, Jr., as executors of the estate of Cilbey L. Wiggins, deceased plaintiffs, and The Mutual Life Insurance Company, of New York, a corporation, defendant, on the part of the defendant.

Doctor Robert L. Burrage, of Orange, Essex County, New Jersey, being duly sworn, deposes and answers as follows, viz.:

Direct interrogatories to be propounded to Robert L. Burrage, a material witness for the defendant. Propounded by Mr. Wilson, Attorney for Defendant:

1.

Q. State your name, age, occupation and place of residence?

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147 A. Robert L. Burrage. Age 53. Occupation, medic director of the Prudential Insurance Company of Americ Residence, Orange, New Jersey.

2.

2. [Q.] If you state in answer to the above question that yo are medical director of the Prudential Insurance Company America, please state whether or not in such capacity you receiv and pass upon applications for insurance to said company?

A. I do.

3.

Q. If in answer to the second question you have stated that yo in your official capacity as medical director of the Prudential In surance Company, receive and pass upon applications for insuranc to said company, please state whether or not an application wa made to said Company by Cilbey L. Wiggins of Pine Barre Florida, for insurance in said company during the year 1908. yea, give date and amount of insurance applied for?

A. In answer to the first part: Yes. In answer to the second par Application dated November 3d, 1908, and amount of insuranc applied for, $40,000.

4.

Q. If you state in answer to the question next above that in surance was applied for in said company by said Wiggins in Noven ber, 1908, state whether or not such insurance as applied for b said Wiggins, was issued on the plan and premium rate as applie for?

A. No.

5.

Q. If you state in answer to the above questions that insuranc was applied for by said Wiggins in your company during th year 1908, state whether or not such application was pending awaiting decision in November and December, 1908. State furth whether or not, if you have stated that such application wa

148 made, such insurance was ever issued by the Prudentia Company?

A. In answer to the first part: Yes. In answer to the second par No.

6.

Q. If you state in answer to questions above that insurance wa applied for in your company by said Wiggins, please state if suc application was received in due course of business by you in you capacity as medical director aforesaid, and if such application wa made, have you the original application? If so, attach the sam to this deposition. If you have not the original application, pleas state where it is, and attach a copy to your deposition?

A. In answer to the first part: Yes. In answer to the secon part: Yes. In answer to the third part: Original application an

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papers attached to deposition, and marked Exhibit A 1-2-3-4 on the part of defendant.

7.

Q. State any other matter or thing within your knowledge which may be material to this cause, and of benefit to either party thereto?

A. The facts in connection with this case so far as they apply with the Prudential Insurance Company of America is concerned, are as follows: That at the time the application dated November 3d, 1908, this company already had in force upon the life of Cilbey L. Wiggins, insurance to the amount of $30,000; that in the judgment of this office, Pine Barren, Florida, the place of residence of Cilbey L. Wiggins, was not a particularly desirable place at which to assume risks to a large amount, and that after considerable investigation and inquiry, lasting over a period of several weeks, a conclusion was arrived at, that because of the age of this applicant, stated to be sixty-one nearest birthday at the time of his application, the amount already at risk and the territorial objection, that it would be inadvisable for the Prudential Insurance Company to increase its line of insurance. The application therefore was simply withdrawn and not declined, there appearing nothing to show that Cilbey L. Wiggins was not
149 a man in good health, or that there was any objection to him per se as an insurance risk.

Cross-interrogatories to Be Propounded to Robert L. Burrage, a Material Witness for the Defendant, by Messrs. Blount & Blount & Carter, Attorneys for Plaintiffs:

1.

Q. If you say that the Prudential Life Insurance Company did not issue a policy upon the application of C. L. Wiggins, please state why it did not so issue it. State in full. State whether such reasons were or not communicated to Wiggins?

A. The Prudential Insurance Company of America did not issue a policy upon the application of Cilbey L. Wiggins for the reason that the time the application dated November 3d, 1908, was made, this company already had in force upon the life of Cilbey L. Wiggins, insurance to the amount of $30,000, and in the judgment of this office, Pine Barren, Florida, the place of residence of the said Cilbey L. Wiggins, was not a particularly desirable place and the company did not care to assume risks of such a large amount, and after considerable investigation and inquiry lasting over a period of several weeks, the conclusion was arrived at that the cause of the age of this applicant, which was stated to be sixty-one nearest birthday at the time of his application, and the amount already at risk, and the territorial objection was inadvisable for the Prudential Insurance Company to increase its line of insurance. The application therefore was simply withdrawn and not declined as there appeared nothing to show that Cilbey L. Wiggins was not a man in good health or that there was any objection to him per se as an in-

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surance risk. No reasons were ever communicated to Mr. Wiggins for not issuing the insurance.

2.

Q. Did or not the Prudential Insurance Company issue any policies to C. L. Wiggins? If so, at what time, and for what amounts, and were they or not in force at the time of the death of the said Wiggins. If in force, did or not the said company pay to the
150 executors of the said Wiggins the amount of insurance contracted for by said policies?

A. In answer to the first part: Yes. In answer to the second part: In January of 1902. Application bearing date January 11, 1902, showing approval by this company. The amount of insurance issued at that time was $30,000, and issued in three policies of $10,000 each. In answer to the third part: This insurance was in force and the amount called for by the policies was paid by this company on the death of Cilbey L. Wiggins. This insurance was paid to whomever it was properly payable.

3.

Q. State anything that you may know to the benefit of the plaintiffs?

A. I am unable to state anything beneficial in any way for the plaintiffs further than above stated by me.

ROBERT L. BURRAGE.

Sworn to and subscribed to before me this 9th day of May, 1911, at Newark, New Jersey.

[SEAL.] HORACE C. GRICE,
Notary Public, Newark, New Jersey.

STATE OF NEW JERSEY,
County of Essex, ss:

Lillie C. Dietze, being duly sworn according to law upon her oath saith that she did on the ninth day of May, one thousand nine hundred and eleven, take down stenographically the deposition of Doctor Robert L. Burrage, a witness produced on the part of the defendant, and did transcribe the said stenographic notes into typewriting, and the said deposition hereto attached is accurately and truly transcribed, and as given by the said Doctor Robert L. Burrage.

LILLIE C. DIETZE.

Sworn to and subscribe before me this 9th day of May, 1911, at Newark, New Jersey.

[SEAL.] HORACE C. GRICE,
Notary Public of New Jersey.

151 THE STATE OF NEW JERSEY,
Essex County, City of Newark:

I, Horace C. Grice, a notary public within and for said county and state aforesaid, hereby certify that the above Doctor Robert L.

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urrage was by me first duly sworn according to law to testify the
uth, the whole truth, and nothing but the truth relating to said
use; that the said answers given by the said deponent were an-
ered, same being taken down stenographically by Lillie C. Dietze,
disinterested person, in my presence and under my direction, and
erwards transcribed into typewiting by the said Lillie C. Dietze;
at I have carefully read over the said deposition and am satisfied
at the same is correct and as testified to by the said witness; and
at said deposition was taken at Newark, in the County of Essex
d State of New Jersey, before me, Horace C. Grice, a notary public
and for the said State of New Jersey, at my office, #763 Broad
reet, Newark, New Jersey, on the ninth day of May, one thousand
ne hundred and eleven, at the hour of two o'clock in the afternoon
accordance with said commission directed to me and herewith
ached.

In testimony whereof, I have hereunto set my hand and official
l the ninth day of May, one thousand nine hundred and eleven.

[SEAL.] HORACE C. GRICE,
Notary Public of New Jersey.

Indorsed: In the United States Circuit Court, for the Northern
strict of Florida. L. Hilton Green and W. A. Finlay, Jr., as
ecutors of the Estate of Cilbey L. Wiggins, Deceased, Plaintiffs,
The Mutual Life Insurance Company of New York, a Corpora-
n, Defendant. Deposition of Dr. Robert L. Burrage. Horace C.
ice, Notary Public, of New Jersey. Filed May 15, 1911. F. W.
rsh, Clerk.

2 And the defendant, further to maintain the issues in its
behalf, offered in evidence the deposition of Mr. W. J. East-
n, which deposition was given upon commission duly issued by
l Court, and filed and published in said cause, and read to the
y, and which deposition, with the exhibits thereto attached, is in
words and figures following:

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In the United States Circuit Court for the Northern District of Florida.

L. HILTON GREEN and W. A. FINLAY, JR., as Executors of the Estate of Cilbey L. Wiggins, Deceased, Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant.

Deposition of Witness Produced, Sworn and Examined on the 1 day of January, A. D. 1912, at the office of Walter C. Booth, commissioner, at No. 32 Liberty Street, in the City of New York, in the State of New York, by virtue of the annexed commission, issued out of the clerk's office of the Circuit Court of the United States for the Northern District of Florida, to me directed, for the examination of said witness, in the cause thereto pending between L. Hilton Green and W. A. Finlay, Jr., as executors of the estate of Cilbey L. Wiggins, deceased, plaintiffs, and The Mutual Life Insurance Company of New York, a corporation, defendant, on the part of the defendant.

WILLIAM J. EASTON, of the City and State of New York, being duly sworn, deposeth and answereth as follows, viz:

Direct interrogatories to be propounded to W. J. Easton, a material witness for the defendant, by Mr. Wilson, Attorney for Defendant:

1.

Q. State your name, age, occupation and place of residence?
153 A. My name is William J. Easton, that I am 62 years of age, my occupation is that of secretary and an officer of The Mutual Life Insurance Company of New York, and that I reside in the City of New York and the State of New York.

2.

Q. Please state whether or not you hold a position with the Mutual Life Insurance Company of New York. If so, what position of office? Were you or not in the same position in the month of December, 1908?

A. I am a secretary, and an officer of The Mutual Life Insurance Company of New York and occupied the said position in the month of December, 1908.

3.

Q. If you state that you are secretary of the Mutual Life Insurance Company, please state whether or not it is your duty as such secretary to receive in due course of business and mail applications for insurance in the defendant company?

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A. It is my duty as such secretary to receive in due course of business and by mail applications for insurance in the defendant company.

4.

Q. If you state that it is your duty to receive applications for insurance in the defendant company in due course of business and mail, please state whether or not in the month of December, 1908, you received an application for insurance made by Cilbey L. Wiggins of Pine Barren, Florida. If you state that you received such application, please state whether or not it was made in duplicate?

A. In the month of December, 1908, the witness received in due course of business and by mail, an application for insurance made by Cilbey L. Wiggins of Pine Barren, Florida, and which application was dated at Pine Barren, in the State of Florida, on the 16th day of December, 1908; that the said application was not in duplicate, but that the rules of the company required that the
154 applicant be examined by two different medical examiners, the report made by one of the medical examiners, to-wit: George C. Kilpatrick, was attached to and made a part of one of the ordinary application blanks of the company in use at that time, and that the said Cilbey L. Wiggins also signed the same paper and filled in the application part thereof in the same form and manner in which the application for insurance was filled in, and that the paper so signed by the said Cilbey L. Wiggins and George C. Kilpatrick, M. D., was also dated at Pine Barren, Florida, December 15, 1908.

5.

Q. If you state in answer to above questions that you received an application for life insurance in the defendant company from Cilbey L. Wiggins, please state if such application was in writing and whether or not you have the original application in your possession. If you state that you have the original application or access thereto, please state whether or not your position or office with the defendant company is such that you as such officer have access or custody thereof?

A. The application for life insurance in the defendant company made by the said Cilbey L. Wiggins was partly printed and partly in writing, that I have the original applicat-on in my possession; that the said application is in my possession as secretary and an officer of the company; that such application at all times has been in my custody as such secretary and I have at all times had access thereto, and the said application is produced before me on this examination.

6.

Q. If in answer to the above questions you state that you have the application of said Wiggins above referred to, please attach the original to your deposition. If the application is in duplicate attach both?

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A. I have attached the application so received in due course of business by mail from the said Cilbey L. Wiggins at Pine Barren, Florida, to this deposition, and the other paper containing the signature of the said Cilbey L. Wiggins and the medical examiner's report signed by George C. Kilpatrick, M. D., is also attached hereto.

155 7.

Q. If in answer to the above questions you have attached the application referred to, please state if it is the identical application upon which the insurance policies referred to in said application were issued?

A. The application which I have attached to this deposition, which application is dated the 16th day of December, 1908, is the identical application upon which the insurance policies referred to in the said application were issued.

8.

Q. Please state whether or not any insurance policies were issued on the application referred to above. If so, how many policies and for what amount was each issued, and what number does each policy bear?

A. Four policies of insurance were issued upon the said application, each dated the 16th day of December, 1908, and each for the sum of $7,662, payable to the insured's executors, administrators or assigns, and that the said policies were numbered respectively 1,765,204, 1,765,206, 1,765,208, 1,765,210.

9.

Q. Please state any other material matter or thing which may be within your knowledge and of benefit to either party to this cause?

A. At the time these policies of insurance were issued, to-wit, at all times during the month of December, 1908, and prior thereto and since, there was in force in the said company a rule binding upon the company and all of its officers, employes and agents, that every application for an amount of insurance that would make his total insurance in the said company $30,000, or more must be examined by two regular medical examiners; that because of such rule the company required that the said Cilbey L. Wiggins should be examined by two regular medical examiners; that one of said medical examiners was one J. S. Turberville, M. D., whose report is attached to the application herein, and the other of said examiners was George C. Kilpatrick, M. D., whose medical report, a portion of which
156 was also signed by the said Cilbey L. Wiggins, has also been attached to the application referred to in the sixth interrogatory; that the company would not have considered the application of the said Cilbey L. Wiggins unless he had first been examined by two regular medical examiners, and that the examination of each was upon the forms of the company as appear by the application and reports attached, pursuant to interrogatory sixth; that in issuing these policies the company acted upon the application signed by Cilbey L.

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Wiggins dated at Pine Barren, Florida, December 15, 1908, and upon the blank to which was also attached the medical examiner's report made and signed by the said J. S. Turberville, M. D., which report is dated December 16, 1908.

Cross-interrogatories Propounded to J. W. Easton, a Witness for Defendant, by Messrs. Blount & Blount & Carter, Attorneys for Plaintiff:

1.

Q. If you say that you received applications for insurance in the defendant insurance company, in the month of December, 1908, made by Cilbey L. Wiggins of Pine Barren, Florida, please state whether one of such applications was accompanied with a medical examiner's report purporting to be signed by C. L. Wiggins and by J. S. Turberville. If you answer yes, then attach said application accompanied by the said medical examiner's report to your deposition, if you have not already done so?

A. The application made by Cilbey L. Wiggins in the month of December, 1908, was accompanied with a medical examiner's report purporting to be signed by Cilbey L. Wiggins and J. S. Turberville, M. D., and that he has already attached the said application and report as required by the sixth interrogatory.

2.

Q. Was or was not one of the said applications an application to which was attached a medical examiner's report, purporting to be signed by Cilbey L. Wiggins and George C. Kilpatrick? If
157 so, if you have not already attached said application accompanied by the said medical examiner's report to your deposition, please do so.

A. Upon an application blank of the company, signed by the said Cilbey L. Wiggins, there was attached a medical examiner's report purporting to be signed by Cilbey L. Wiggins and George C. Kilpatrick and that the said paper and report have also been attached, pursuant to the request contained in the sixth interrogatory.

3.

Q. If you state that you received said application accompanied with said medical examiner's report, please state the exact date upon which you received them; from whom did you receive them? Were they not accompanied by a letter? If so, by whom, and when, and from what place was said letter written? Attach said letter to your deposition, or if you decline to attach the original produce it to the commissioner and attach a copy verified by him?

A. The said applications were received at the office of the company December 21, 1908; that the applications were received by mail at the home office of the company, No. 34 Nassau Street, in the City of New York, on the 21st day of December, 1908; that they were not

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accompanied by any letter; that he is informed that the applications were delivered to Cecil Wilcox, the manager of The Mutual Life Insurance Company of New York at Jacksonville, Florida, and that the same were transmitted by mail by said Cecil Wilcox from Jacksonville, Florida, to the defendant company at its home office in the City of New York.

4.

Q. Did you or the defendant receive at any time any letter or other communication from C. L. Wiggins touching his application for insurance which was afterwards issued to him by the defendant? If so, attach copies of said communication?

A. The defendant did not at any time receive any letter or other communication from C. L. Wiggins touching his application for insurance which was afterwards issued to him by the defendant upon the application.

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5.

Q. Referring to the letter accompanying the applications referred to in interrogatory three, state what relation, if any, to the defendant was occupied by the person who wrote said letter, at the time the letter was written, how long before said time had said relation existed and how long did it exist after said time?

A. The applications were received by mail from Cecil Willcox, the manager for the defendant company at Jacksonville, in the State of Florida; that the said Cecil Willcox was the manager for the defendant at Jacksonville, in the State of Florida at that time and was authorized to receive applications made to the company and transmit the same to the company at its home office in the City of New York; that the said Cecil Willcox is still in the employ of the defendant company and is still the manager for the defendant company at Jacksonville, in the State of Florida.

6.

Q. Please state any other matters or things known to you of benefit to either party to this cause?

A. The policies of insurance Nos. 1,765,204, 1,765,206, 1,765,208 and 765,210 were mailed by the defendant from its home office in the City of New York to Cecil Willcox, the manager for the defendant, at the agency in the City of Jacksonville, in the State of Florida, on the 22nd day of December, 1908; that there was in Alabama or Florida no person of any description and having any connection with the defendant company in any capacity whatsoever, who had any authority to accept the said application on behalf of the defendant company and agree to issue policies of insurance thereon; that he is informed that the policies were personally delivered to Cilbey L. Wiggins at Pine Barren, in the State of Florida, and that the said Cilbey L. Wiggins accepted the said policies at Pine Barren in the

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ate of Florida, and paid the premiums therefor; that the defendant ceived at its home office in the City of New York the net premiums these policies from Cecil Willcox, the manager of the defendant Jacksonville, in the State of Florida.

W. J. EASTON.

9 Sworn to and subscribed before me this 11th day of January, 1912.

WALTER C. BOOTH,
Commissioner.

Indorsed: L. Hilton Green and W. A. Finlay, Jr., as Executors the Estate of Cilbey L. Wiggins, Deceased, Plaintiff, vs. The tual Life Insurance Company of New York, a Corporation, Defendant. In the United States Circuit Court, Northern District of orida. Filed June 13, 1912. F. W. Marsh, Clerk.

And thereupon, with the admission of plaintiffs, that C. L. Wigs, the deceased, insured, signed the applications attached to the positions of the witness W. J. Eastman, and that the signature ilbey L. Wiggins," where it appears on said application, is the nature of the said Wiggins, the defendant rested its case.

And thereupon, the plaintiffs, to further maintain the issues in ir behalf, introduced in evidence the deposition of Dr. JOHN C. LEOD, which deposition was given in pursuance of a commission ued by said Court and which said deposition was duly filed and blished in said cause, and read to the jury, and was, together with exhibits thereto attached, in the words and figures following:

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Interrogatories to be Propounded to J. C. McLeod, a Material Witness for the Plaintiffs. Messrs. Blount & Blount & Carter, Attorneys for Plaintiffs.

In the United States District Court, Northern District of Florida, at Pensacola.

L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased,

versus

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation.

Deposition of John C. McLeod, a witness produced, sworn,
150 and examined on the 13th day of February, A. D. 1912, at the office of Charles Hall, in the Town of Bay Minette, in the State of Alabama, by virtue of the annexed commission issued out of the office of the clerk of the District Court of the United States for the Fifth Circuit and Northern District of Florida, at the City of Pensacola, on the 1st day of February, 1912, and to me directed for the examination of the said witness, in a case therein pending between L. Hilton-Green and W. A. Finley, Jr., as executors of the estate of C. L. Wiggins, deceased, plaintiffs, and Mutual Life Insurance Company of New York, a corporation, defendant.

J. C. McLEOD, of Bay Minette, Alabama, being by me duly sworn, deposeth and answereth as follows, viz:

1.

Q. Please state yur name, age, residence and occupation?

A. My name is John C. McLeod, my age is thirty-two years, my residence is Bay Minette, Baldwin County, Alabama, my occupation is a physician.

2.

Q. How long has such been your place of residence, and how long has such been your occupation?

A. Such has been my place of residence for the last past twelve years, and such has been my occupation for the past twelve years.

3.

Q. Did you, or not, on or about the 4th day of November, 1908, as medical examiner, examine Cilbey L. Wiggins, upon an application then presented by him to the Prudential Insurance Company, for insurance upon his life? If so, where did you make such examination? Did you, or not, sign a written medical examiner's report, showing the result of said examination?

A. I did make such examination of Cilbey L. Wiggins as medical examiner on the 4th day of November, 1908, upon an application

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by him to the Prudential Insurance Company for insurance
161 upon his life. I made such examination at the office of Cilbey L. Wiggins at Pine Barren, Florida. I did sign a written medical examiner's report, showing the result of said examination.

4.

Q. As a part of such examination, did you, or not, make a physical examination of the said Wiggins? If so, did or not the statement signed by you truly set forth what you found as to his physical condition upon examination?

A. I did make a physical examination of the said Wiggins as a part of such examination, and the statement signed by me truly set forth what I found as to his physical condition upon such examination.

5.

Q. Did you, or not, examine his heart? If so, did you find any indications of disease thereof?

A. I did examine his heart; there was no perceptible indications of disease of his heart.

6.

Q. What, if any, did you find to be the rate of his pulse per minute? Did the pulse intermit or not? Was it regular or not?

A. I found the rate of his pulse per minute seventy-two. The pulse did not intermit. It was not irregular.

7.

Q. Did you, or not, find the said Wiggins at said time free from physical and mental defect and in good health?

A. So far as I was able to discover at the time I *make* [made] said examination said Wiggins was free from physical and mental defects and in good health.

8.

Q. Was he or not, in your opinion, physically a first-class risk?

162 A. In my opinion he was physically a first-class risk for a man of his age.

9.

Q. After you made and signed the said medical examiner's report, what became of said report? Did or did it not go into the possession of the agent of the Prudential Life Insurance Company, or was it or not transmitted by you direct to that company?

A. After I had made and signed the said medical examiner's report, I am not certain as to what I did with it, but to the best of my recollection I delivered it to the agent of the Prudential Life Insurance Company.

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10.

Q. State anything else that you may know to the benefit of the plaintiffs or defendant?

A. I don't know anything more that would benefit the plaintiffs or defendant.

Cross-interrogatories to be Propounded to J. C. McLeod, a Material Witness for the Plaintiffs. Emmett Wilson, Attorney for Defendant.

The defendant objects to each and every of the direct interrogatories to be propounded to the witness, upon the ground that each and every of said interrogatories is irrelevant, immaterial, and not pertinent to the issues in this case.

Subject to the above objection the defendant files the following cross-interrogatory:

1.

Q. If, in answer to the third direct interrogatory, you state that you examined Cilbey L. Wiggins upon an application presented by him to the Prudential Insurance Company, do you know, as a matter of fact, that said company refused to issue the insurance applied for?

A. I do not know as a matter of fact that said company
163 refused to issue the insurance applied for as the Prudential Insurance Company did not notify me.

J. C. McLEOD.

Sworn to and subscribed before me the 13th day of February, 1912.

CHAS. HALL,
Commissioner.

Indorsed: Charles Hall, Attorney at Law, Bay Minette, Ala. L. Hilton Green and W. A. Finley, Jr., as Exrs. of Est. of C. L. Wiggins, Decd., vs. Mutual Life Insurance Co. of New York, a Corp. In the United States Dist. Court, Northern Dist. of Fla. Filed February 15, 1912. F. W. Marsh, Clerk.

And the plaintiffs, further to maintain the issues in their behalf, introduced in evidence the deposition of J. C. Hogue, which deposition was given in pursuance of a commission issued by said Court, and which said deposition was duly filed and published in said cause, and read to the jury, and was in the words and figures following:

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In the United States Circuit Court, Northern District of Florida, at Pensacola.

L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of C. L. Wiggins, Deceased,
versus
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Interrogatories to be Propounded to J. C. Hogue, a Material Witness for the Plaintiffs. Messrs. Blount & Blount & Carter and Neil McCarron, Attorneys for Plaintiffs.

JOHN C. HOGUE, of Frostburg, Md., produced, sworn and examined on the 12th day of January, A. D. 1912, at the office of Chas. G. Watson, at Frostburg, Md., by virtue of the annexed commission, issued out of the clerk's office of the District Court of the United States for the Northern District of Florida, to us directed,
164 for the examination of the said witness in a cause there depending between L. Hilton-Green and W. A. Finlay, Jr., as executors of C. L. Wiggins, deceased, and Mutual Life Insurance Company of New York, on the part of the plaintiff.

JOHN C. HOGUE, of Frostburg, Allegany County, Maryland, being duly sworn, deposeth and answereth as follows, viz:

1.

Q. (*a*) What is your name, age and place of resident?
A. (*a*) John C. Hogue; my age is 41; my residence is Frostburg, Md.
Q. (*b*) What was your occupation in the months of October, November and December, 1908?
A. (*b*) Life insurance agent.
Q. (*c*) In what State was such occupation carried on?
A. (*c*) In Alabama.

2.

Q. (*a*) In pursuit of such occupation, did you, or not, on or about December 15, 1908, have anything to do with the procuring of applications from C. L. Wiggins, upon which there was subsequently issued to him four policies of insurance in the defendant insurance company, each for $7,662.00?
A. (*a*) I did.
Q. (*b*) If you answer yes, look at the photographs hereto attached, marked "A" and "B" and state if they are photographic copies of the applications mentioned?
A. (*b*) They are photographic copies of the application mentioned.

3.

Q. (*a*) Prior to the obtaining of such applications, had you, or not, made any efforts to induce the said Wiggins to allow you to place insurance upon his life?

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A. (*a*) Yes, on several occasions.

165 Q. (*b*) Did he approach you, or you approach him, upo
the subject?

A. (*b*) I approached him every time.

Q. (*c*) Was he or not, disinclined to take out insurance on hi
life, in addition to that he already had?

A. (*c*) He had no idea of taking out any insurance in additio
to that he already had, and it was only after exceptionally har
work on my part that he consented to even consider the matter.

Q. (*d*) What reason, if any, did he give for such disinclination

A. (*d*) He felt that he carried considerable insurance, all h
really wished to carry, and was disinclined to make any furthe
investment in this line.

Q. (*e*) State fully all efforts which you made to induce him t
take such insurance?

A. (*e*) I endeavored to get Mr. Wiggins to increase his insuranc
estate several months previous to taking his application. I wen
to see him on several occasions. I casually met him on two or thre
other occasions when we discussed the matter at length; I suggeste
to him that while he was carrying a very fair insurance estate, y
he was carrying a very small one in comparison with that carrie
by many other men possessing less wealth than he; he was alway
afraid it would be a very poor investment on his part. I insiste
that, above other things, it was a duty on his part as a representativ
business man of wealth to carry more, if only for the influence
exerted on the lives of the men in his community. In overcom
ing his objections I used every known diplomacy used by insuranc
men, taking advantage also of the very kindly feeling he ente
tained for me covering an acquaintanceship of several years, datin
from a friendship six years, previously, when I had induced hi
to take thirty thousand in the Prudential. He, however, even use
this previous investment made through me after calculating th
money he had already expended as a reason to prove that a furth
investment of this kind would not be a good one. In all my i
surance experience among all kinds of cases, covering the perio
of many years, I do not remember of a single instance where I ha
as much to overcome or worked harder to get results as I did in th
case. He did not want the insurance and I do not believe any oth
man could have interested him in an insurance at all.

166 felt at the time that the getting of this was a signal victo
for me.

4.

Q. (*a*) Look at the photograph marked "A" on the upper le
hand corner, and state when the said Wiggins signed the origin
application and medical examiner's report shown thereon?

A. (*a*) Mr. Wiggins signed the application, photographic cop
of which is marked "A," on or within two or three days of the da
shown thereon. As to the medical examiner's report I do not kno
just when he signed that. It was not, however, on the same dat

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and must have been between that time and a period two or three days later when I received the papers back.

Q. (*b*) Where did he sign them?

—. (*b*) Mr. Wiggins was in Atmore, Alabama, about this date, at which place I casually met him. On the porch of the hotel in Atmore we discussed this matter at some length. He was going to take the afternoon train to Flomaton, Alabama, and make connections returning to his home at Pine Barren, Florida. I was going through from Atmore, Alabama, to Evergreen, Alabama. Because of this talk with Mr. Wiggins and his consent to consider increasing his insurance estate and he would only give me his consent for two installment policies of ten thousand each, any additional to be sent at my own risk; I rode on the train to Flomaton, Alabama, with him, and we got off the train together at that point, going into the depot waiting room, where I took the data for this application and where he signed this application. He then proceeded to his home at Pine Barren, Fla., and I took a later train for Evergreen, Ala.

Q. (*c*) If you say that he signed them in Flomaton, Alabama, or at any place in Alabama, state how it came about that he signed them at such place?

A. (*c*) As per above answer.

Q. (*d*) When he signed them, to whom did he deliver them?

A. (*d*) The application was signed for me and immediately delivered to me.

Q. (*e*) If you say that he delivered them to you, state
167 whether or not they ever, after such delivery, went into his hands or possession, or under his control?

A. (*e*) No, they were never given over to his possession or under his control after coming back to me.

Q. (*f*) Did he ever thereafter see them, so far as you know?

A. (*f*) As far as my knowledge goes, no; of course it was necessary for him to see them to sign the medical report.

Q. (*g*) To whom did you deliver them?

A. (*g*) I delivered them to Dr. George C. Kilpatrick who resides in Pine Barren, Florida.

Q. (*h*) And when?

A. (*h*) I cannot tell exactly, but within one or two days of this time.

Q. (*i*) And where?

A. (*i*) At Pine Barren, Florida.

Q. (*j*) If you state that you delivered them to J. D. Torrey, state what relation he had, if any, at the said time, to the defendant?

A. (*j*) After Dr. Kilpatrick, to whom the papers were delivered, had completed the examinations, they were again given into my possession. I then delivered them personally to Mr. J. R. Tapia, the manager of the Prudential Insurance Company of America, at his office in Mobile, Alabama, with instructions that he call up or get in touch with Mr. J. D. Torrey, district agent for the Mutual Life Insurance Co., of New York, at Mobile, Alabama, and turn these papers over to him.

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5.

Q. (*a*) When C. L. Wiggins delivered to you the application and medical examiner's report, shown on photograph "A," had, or had not, the written answers now shown on said protograph, to questions 1 to 22, in the application, been written, or were the spaces provided for such answers blank?

A. (*a*) I completed the answers to all questions on the application from 1 to 22 inclusive, at the time Mr. C. L. Wiggins signed the application, with the exception of Question 16, giving
168 the commuted value on the total policies we proposed having issued out for his consideration and final decision.

Q. (*b*) If not, when were they written?

A. (*b*) Answered in above answer.

Q. (*c*) And where?

A. (*c*) At Flomaton, Alabama.

Q. (*d*) And by whom?

A. (*d*) I wrote answers down from the information received from Mr. C. L. Wiggins, after which he signed the application.

Q. (*f*) Were they, or not, written after, or before, you signed the application?

A. (*f*) This application never was signed by me, but these answers were written by me in the application before he signed it.

Q. (*g*) Did he, or not, communicate to you, or to any agent of the defendant, the information contained in said answers?

A. (*g*) He communicated this information to me and to me only.

Q. (*h*) If not, how did you, or the persons who wrote such answers, get the information which was thought to warrant the said answers?

A. (*h*) Answered above.

6.

Q. (*a*) You will note that the said application, as shown in photograph "A," purports to be dated at Pine Barren, Florida, and that apparently some other word or words have been erased, and the word- "Pine Barren, Fla." substituted. State what words were originally written after the word "dated"?

A. (*a*) After the word "dated" in my handwriting was Flomaton, Alabama, the place where I took this application. This was afterwards erased and Pine Barren, Florida, substituted, likely by Mr. Torrey, after these papers had been delivered to him.

Q. (*b*) When were said original words written?

A. (*b*) Said original words were written at the time the application was taken.

Q. (*c*) And where?

169 A. (*c*) At Flomaton, Alabama.

Q. (*d*) And by whom?

A. (*d*) By me.

Q. (*e*) By whom were the substituted words written?

A. (*e*) I was not personally present when it was changed. I am

miliar with the handwriting of Mr. Torrey, the agent to whom it as delivered, and believe this change is in his handwriting.

Q. (*f*) And when?

A. (*f*) I cannot tell, but it must necessarily have been between he time the papers were delivered to him and the time he forwarded hem to the company.

Q. (*g*) And where?

A. (*g*) Personally I do not know, but it must have been at Mobile, labama.

Q. (*h*) And why?

A. (*h*) I do not know why except from (what) I have heard nce this suit was filed.

7.

Q. (*a*) You will note also that the word "none," in answer to the hird question, is written in a different handwriting from that used n filling out said application. State in whose handwriting that word s written?

A. (*a*) I do not recognize the writing of "None" used in answer- ng the third question. This answer is entirely superfluous and he question in this case called for no answer whatever, and for that eason I did not answer it. This question is always answered by me y a blank, unless the answer is other than "None."

Q. (*b*) When was it written?

A. (*b*) I do not know.

Q. (*c*) And where?

A. (*c*) I do not know.

Q. (*d*) And by whom?

A. (*d*) I do not know.

Q. (*e*) If you say that it was written by J. D. Torrey, agent of he defendant, or by anyone else, by his authority, state whether the aid Wiggins made any answers to the said questions at any time?

A. (*e*) Mr. Wiggins answered this question to me in such 70 a way that from the wording of the question a written answer *answer* by me was unnecessary. It is simply a statement ouched for to be correct by the applicant, and does not call for n answer.

Q. (*f*) Did he or not authorize anyone to write the said answers or him?

A. (*f*) No, because an answer was unnecessary except the answer given to me, which was that he did not contemplate such a journey.

Q. (*g*) If the said answer was not written by Torrey, by whom vas it written?

A. (*g*) I do not know.

8.

Q. (*h*) And was or was not such writing done by Torrey's direc- ions?

A. (*h*) I do not know.

Q. (*a*) You will note that the answer to Question 16 in the said pplication is written in a different handwriting from that used in illing out the said application, and that it is in part scratched, and

the figures 3 and 648 substituted for some other figures. State when the said figures were changed and the remainder of said answer written?

A. (*a*) The answer to Question 16, which in a policy of this kind called for the commuted value which the company would insert in the contract, I left blank, and instructed Mr. Tapia to fill in, not being certain of the exact commuted value allowed by the Mutual Life. I am familiar with Mr. Tapia's handwriting, and feel that these figures were inserted by him, beyond doubt, at the request of Mr. Torrey, and from the company's rate book, showing this commuted value.

Q. (*b*) And where?

A. (*b*) I do not know.

Q. (*c*) And by whom?

A. (*c*) I do not know, except as stated above.

Q. (*d*) And why?

A. (*d*) To comply with the company's schedule of value.

9.

Q. (*a*) In the said application, J. D. Torrey, soliciting
171 agent, states "I have known the above named applicant six years and saw him sign this application." State whether or not the said Torrey did see the said Wiggins sign the said application.

A. (*a*) Mr. J. D. Torrey did not see Mr. Wiggins sign this application, and further informed me that he never knew Mr. Wiggins, not even by sight.

Q. (*b*) Where was J. D. Torrey when Wiggins signed the said application?

A. (*b*) In Mobile, Alabama.

Q. (*c*) Was he or not present at the signing by Wiggins?

A. (*c*) He was not.

10.

Q. (*a*) Did or not, Wiggins sign the medical examiner's report shown in photograph "A," at the same time as he signed the application?

A. (*a*) He did not.

Q. (*b*) If not, at what time did he sign it?

A. (*b*) Within a day or two after the doctor had completed his report.

Q. (*c*) And where?

A. (*c*) At Pine Barren, Florida, in his own office.

Q. (*d*) At the time that he signed, had the written answers now shown on said photograph "A" to the questions contained in said examiner's report, been written?

A. (*d*) I was in the office at Pine Barren, Florida, when Mr. Wiggins signed this medical report, but I am not certain whether every question was answered previous to his signing or not.

Q. (*e*) If not, when were they written?

A. (*e*) I cannot answer other than stated above.

Q. (*f*) And by whom?
A. (*f*) By the medical examiner, Dr. Kilpatrick.
Q. (*g*) And where?
A. (*g*) At Mr. Wiggins' office at Pine Barren, Florida.
Q. (*h*) If you say that they were written by the medical examiner, Geo. C. Kilpatrick, state whether the said Wiggins was present when they were so written?

A. (*h*) I saw Dr. Kilpatrick writing out the answers to the
172 questions on the medical blank, which was subsequently signed by Mr. Wiggins.

Q. (*i*) Were or not, the printed answers contained in said examiner's report, put to and answered by the said Wiggins?
A. (*i*) I do not know other than as stated above.
Q. (*j*) If not, why not?
A. (*j*) Refer to above answer.
Q. (*k*) Where did the medical examiner get the information contained in the answers so written by him?
A. (*k*) Necessarily from Mr. C. L. Wiggins.

11.

Q. (*a*) Look at the photograph marked "B," on the upper left hand corner, and state when the said Wiggins signed the original application and medical examiner's report shown thereon.
A. (e) Yes, they are both in the handwriting of Mr. Wiggins.
Q. (*b*) Where did he sign them?
A. (*b*) I do not know.
Q. (*c*) If you say that he signed them in Flomaton, Alabama, or at any place in Alabama, state how it came about that he signed them at such place?
A. (*c*) My application was what he signed in Alabama, and that was all.
Q. (*d*) When he signed them, to whom did he deliver them?
A. (*d*) They were delivered through Dr. Kilpatrick to me.
Q. (*e*) If you say that he delivered them to you, state whether or not they ever, after such delivery, went into his hands or possession, or under his control?
A. (*e*) Not after Dr. Kilpatrick delivered them to me.
Q. (*f*) Did he ever thereafter see them, so far as you know.
A. (*f*) He did not.
Q. (*g*) To whom did you deliver them?
A. (*g*) I delivered them, as before stated, to Mr. J. R. Tapia at our office at Mobile, Alabama, with instructions to give them to Mr. J. D. Torrey, the district agent for the Mutual Life Insurance Co. at Mobile, Ala.

173 Q. (*h*) And when?

A. (*h*) As before stated, within two or three days of the date named in these papers.
Q. (*i*) And where?
A. (*i*) At Mobile, Alabama.
Q. (*j*) If you state that you delivered them to Mr. J. D. Torrey, state what relation he had, if any, at the said time, to the defendant?
A. (*j*) Refer to above answer.

12.

Q. (*a*) When C. L. Wiggins delivered to you the medical exam iner's report, and application, shown on photograph "B," had or ha not the written answers now shown on said photograph, to questio 1 to 22, in the application, been written, or were they blank?

A. (*a*) They were blank.

Q. (*b*) If not, when were they written?

A. (*b*) They were evidently written after the papers were deli ered by Mr. Tapia to Mr. Torrey, and before they were sent on b him to the company. I recognize the handwriting to be the han writing of Mr. Torrey. It was entirely unnecessary for Mr. Torr to have filled the application part of this second form "B" at al Neither was it necessary for Mr. Wiggins to have signed that part t is form.

Q. (*c*) And where?

A. (*c*) As above stated.

Q. (*d*) And by whom?

A. (*d*) As above stated.

Q. (*e*) If you say that they were written under the direction J. D. Torrey, state in what office they were written, and why?

A. (*e*) I was not there, and there was no reason why they shou have been written at all.

Q. (*f*) State whether or not the said questions, or any of the were put to the said Wiggins before the answers were written?

A. (*f*) I do not know.

Q. (*g*) Or at any time?

A. (*g*) I do not know.

174 Q. (*h*) Were they or not written before or after he sign said application?

A. (*h*) I do not know.

Q. (*i*) Did he or not communicate to you, or to any agent of t defendant, the information contained in the said answers?

A. (*i*) No, he was not supposed to. He was to communicate the answers to our medical examiners.

Q. (*j*) If not, how did you, or the person who wrote such answe get the information which was thought to warrant them?

A. (*j*) I suppose they got them from Mr. Wiggins. That w not my part of it.

13.

Q. (*a*) You will note that the said application, as shown on t photograph "B," purports to have been written at Pine Barre Florida. State whether it was so dated or not.

A. (*a*) No, it was entirely blank when it left my hands for d livery to Mr. Torrey.

Q. (*b*) If not, when were the words "Pine Barren, Fla." writte

A. (*b*) I do not know, but do know it was after the papers in f were delivered to Mr. Torrey to send to the company.

Q. (*c*) And where?

A. (*c*) After they left my hands, in Mobile, Alabama.

Q. (*d*) And by whom?

A. (*d*) I recognize it as being in Mr. Torrey's handwriting.

14.

Q. (*a*) In the said application, J. D. Torrey, soliciting agent, stated, "I have known the above named applicant six years, and saw him sign this application." State whether or not the said Torrey did see the said Wiggins sign the said application?

A. (*a*) Mr. Torrey did not see Mr. Wiggins sign the application.

175 Q. (*b*) Where was J. D. Torrey when Wiggins signed the said application?

A. (*b*) He was in Mobile, Alabama.

Q. (*c*) Was he or not present at the signing by Wiggins?

A. (*c*) He was not.

15.

Q. (*a*) Did or did not, Wiggins sign the medical examiner's report shown in photograph "B," at the same time as he signed the application?

A. (*a*) I presume he did, because it was altogether unnecessary for him to have signed the application on this form "B." This was signed in error.

Q. (*b*) If not, at what time did he sign it?

A. (*b*) As above stated.

Q. (*c*) And where?

A. (*c*) As above stated.

Q. (*d*) At the time that he signed, had the written answers now shown on said photograph "B" to the questions contained in said examiner's report been written?

A. (*d*) I do not know.

Q. (*e*) If not, when were they written?

A. (*e*) I do not know.

Q. (*f*) *Any* [and] by whom?

A. (*f*) The doctor making the report.

Q. (*g*) And where?

A. (*g*) I do not know

Q. (*h*) If you say that they were written by the medical examiner, J. S. Turberville, state whether the said Wiggins was present when they were so written?

A. (*h*) I do not know.

Q. (*i*) Were or were not the printed answers contained in said examiner's report put to and answered by the said Wiggins?

A. (*i*) I do not know.

Q. (*j*) If not, why not?

A. (*j*) Refer to above answer.

Q. (*k*) Where did the medical examiner get the information contained in the answers so written by him?

A. (*k*) I do not know, but presumably from Mr. Wiggins.

176 16.

Q. (*a*) Were the answers written in the application shown on photograph "A" written before the answers were written in photograph "B," or the reverse?

A. (*a*) The answers written in the application as shown in photograph "A" were written by me in Flomaton, Alabama. Those in photograph "B" were written several days later after my application and both medical reports had been completed and delivered by me to Mr. Tapia with instructions to give them to Mr. J. D. Torrey to send on to his company.

Q. (*b*) Was or was not one of them copied from the other?

A. (*b*) It is evident that the application on form "B" was entirely copied from the original application, as shown on form "A."

Q. (*c*) If so, which was copied from the other?

A. (*c*) Form "B" was copied from form "A" the original application.

17.

Q. (*a*) Were you or not informed, at the time when you received the said applications and the medical examiner's reports, or thereafter, before they were transmitted by J. D. Torrey to the defendant, that Wiggins had been in a sanatarium in Montgomery, and had been operated on by Dr. C. A. Thigpen for an inverted tooth?

A. (*a*) I was well aware of the fact that Mr. C. L. Wiggins had been in an infirmary at Montgomery, Alabama, and under the care of Dr. Thigpen, and this information came to me from Mr. C. L. Wiggins himself, who at the time was informing two medical examiners, one of which was Dr. Kilpatrick, of the fact and full circumstances. The other examiner whom he gave this information in my presence was Dr. J. C. McLeod, of Bay Minette, Alabama, also an examiner for the Mutual Life Insurance Co., both of whom were present in the office of Mr. C. L. Wiggins, at Pine Barren, Florida, for the purpose of making a special double examination of Mr. Wiggins for insurance.

Q. (*b*) If you had been so informed, then state?

A. (*b*) —.

177 Q. (*c*) From whom did you obtain such information?

A. (*c*) As above stated.

Q. (*d*) And when?

A. (*d*) As above stated.

Q. (*e*) And where?

A. (*e*) As above stated.

18.

Q. (*a*) Were you or not informed, at the time when you received the said applications and the medical examiner's reports, or thereafter, before they were transmitted by J. D. Torrey to the defendant, that Wiggins had been in Hot Springs, Arkansas, in order to seek relief from the pains produced by such tooth?

A. (*a*) I was not.

Q. (*b*) If you say you had been so informed, then state.

A. (*b*) —.

Q. (*c*) From whom did you obtain such information?

A. (*c*) Nobody.

Q. (*d*) And when?

A. (*d*) At no time.

Q. (*e*) And where?
A. (*e*) Nowhere.

19.

Q. (*a*) Were you or not informed, at the time when you received the said applications and medical examiner's reports, or thereafter, before they were transmitted to the defendant, that Wiggins had been in Atlanta, Georgia, to consult Dr. Calhoun about pains in his head resulting from an inverted tooth?

A. (*a*) I simply know that I heard Mr. Wiggins carefully go over the whole matter with the doctors as above stated, in my presence. I do not remember hearing Dr. Calhoun's name mentioned.

Q. (*b*) And to Pensacola, Florida, to consult Dr. F. M. Thigpen about the same matter?

A. (*b*) Yes, I remember Dr. Thigpen's name being mentioned by Mr. Wiggins.

Q. (*c*) And had consulted Dr. W. P. Dey, at Pine Barren, Florida, about the same matter?

178 A. (*c*) I do not remember only as above stated.

Q. (*d*) Or generally that Wiggins had consulted doctors about that matter?

A. (*d*) As above stated.

Q. (*e*) If you had been so informed, then state?

A. (*e*) —.

Q. (*f*) From whom did you obtain such information?

A. (*f*) From Mr. Wiggins himself, in the presence of the doctors, as above stated.

Q. (*g*) And when?

A. (*g*) As above stated.

Q. (*h*) And where?

A. (*h*) In Mr. Wiggins' office in Pine Barren, Florida.

20.

Q. (*a*) Were you informed, at the time when you received the said applications and medical examiners' reports, or thereafter, before they were transmitted to the defendant, that Wiggins had suffered from indigestion?

A. (*a*) I was not informed.

Q. (*b*) If you had been so informed, then state?

A. (*b*) —.

Q. (*c*) From whom did you obtain such information?

A. (*c*) Was not informed.

Q. (*d*) And when?

A. (*d*) At no time.

Q. (*e*) And where?

A. (*e*) Nowhere.

21.

Q. (*a*) If you say that you were informed as to any of the matters inquired about in the preceding interrogatories, numbered 17,

18, 19 and 20, state whether or not you informed J. D. Torrey of the facts as to which you had been informed?

A. (*a*) No, I did not.

Q. (*b*) If so, state specially of which of the said facts you so informed him?

A. (*b*) None, as I did not deem it necessary.

179 Q. (*c*) And when?

A. (*c*) At no time.

Q. (*d*) And where?

A. (*d*) Nowhere.

Q. (*e*) If you did not inform him, do you know whether he was or was not otherwise informed?

A. (*e*) I do not know.

Q. (*f*) If so, as to which of the said facts? State particularly?

A. (*f*) None.

Q. (*g*) And how had he been informed?

A. (*g*) I do not know.

Q. (*h*) And when?

A. (*h*) I do not know.

Q. (*i*) And where?

A. (*i*) I do not know.

22.

Q. (*a*) Were you informed at the time when you received the said applications and medical examiner's reports, or thereafter, before they were transmitted to the defendant, that Wiggins had in the month of November, 1908, made application to the Prudential Life Insurance Company of America for insurance upon his life to the extent of forty thousand ($40,000.00) dollars, upon which no policy, or policies, had been issued?

A. (*a*) I had knowledge of this because I myself wrote the application. And because of the fact that Escambia County, Floria, the home of Mr. Wiggins had immediately before this date been put in the restricted territory because of general climatic conditions, and the company could not make an exception in this case. These policies were not issued and the application not placed on the decline list, but on the withdrawn list.

Q. (*b*) If you had been so informed, then state?

A. (*b*) —.

Q. (*c*) From whom did you obtain such information?

A. (*c*) As above stated.

Q. (*d*) And when?

A. (*d*) Answered above.

180 Q. (*e*) And where?

A. (*e*) Answered above.

23.

Q. (*a*) If you say that you were informed as to said application to the Prudential Life Insurance Company of America, state whether or not you informed J. D. Torrey of the fact that such application had been made, and of the circumstances connected therewith?

A. (*a*) I did.
Q. (*b*) And when?
A. (*b*) A few days previous to the time I took Mr. Wiggins' application for the Mutual Life.
Q. (*c*) And where?
A. (*c*) At Mobile, Alabama.
Q. (*d*) If you did not inform him, do you know whether he was or not otherwise informed?
A. (*d*) He was informed by me, as above stated.
Q. (*e*) And how had he been informed?
A. (*e*) As above stated.
Q. (*f*) And when?
A. (*f*) As above stated.
Q. (*g*) And where?
A. (*g*) At Mobile, Alabama.

24.

Q. State anything else that you may know to the benefit of either of the parties to this suit?

A. I wrote Mr. Wiggins, as before stated, after the most strenuous effort, and the case was so hard I considered it a very special victory. Mr. Wiggins had much money to invest at the time, but felt that with his — he had so many years to live it would be a losing investment. He stated to me, "I am a man of perfect habits, and always have been, living a careful, methodical life. I expect to gradually retire, so that in four or five years I will have very little to look after but my investments. He said, "besides I am now in better physical shape than I was six years ago when you wrote me forty thousand dollars in the Prudential, the company should give a man of my habits a special rate." Mr. Wiggins, after all my
181 efforts, would only guarantee to favorably consider twenty thousand of the forty thousand mentioned in the application, which I was sending out to him. After this had gone forward I heard Mr. Wiggins was investing at least two hundred thousand dollars just at this time. I, therefore, feeling that I could bring extra pressure to bear upon him, ordered twenty thousand more by wire. This is not shown on the application at all, but will show on the records of the Mutual Life. After my most diplomatic handling of the affair forty thousand is all I could place with him, and felt very fortunate in doing this; the remaining twenty thousand I was forced to return for cancellation. The Prudential Company refused to issue policy as applied for simply because he was in restricted territory. I felt so certain of this risk and the exceptional quality of this business, that, notwithstanding the fact that this was in restricted territory, I went ahead with his examination, feeling the company could not afford to refuse this business, and make an exception in his case. Mr. Wiggins positively did not suppress any information relative to the tooth trouble. I was not aware when these reports were turned over to Mr. Torrey but what this full information was mentioned therein. It was the doctor's fault and not Mr. Wiggins. Mr. Wiggins felt that he had many years to live and

as he acted with me in perfect good faith and to my knowledge suppressed nothing. He was not looking for insurance and did not want it.

JOHN C. HOGUE.

Cross-interrogatories.

By Mr. WILSON:

Cross-interrogatories to be propounded to J. C. Hogue, a material witness for the plaintiffs:

Defendant objects to the second direct interrogatory upon the grounds:

1. That it is irrelevant, immaterial and not pertinent to the issues.

182 2. (To "*b*.") Because the witness should have before him the original application before being permitted to identify it.

Defendant objects to the questions embraced in the third interrogatory upon the ground that they are irrelevant, immaterial and not pertinent to the issues.

Defendant objects to the questions embraced in the fourth interrogatory upon the grounds:

1. That they are irrelevant, immaterial and not pertinent to the issues.

2. That the witness should have before him the original application before testifying with reference to it.

3. (To "*a*, *b*, and *c*.") That the application shows upon its face when it was signed, and where it was signed, and these questions seek to elicit testimony to vary the writing.

Defendant objects to the questions embraced in the fifth interrogatory upon the grounds:

1. That they are irrelevant, immaterial and not pertinent to the issues.

2. That the witness should have before him the original application before testifying with reference thereto.

3. That they seek to elicit testimony to vary the terms of the written application.

Defendant objects to the questions embraced in the sixth interrogatory upon the grounds:

1. That the witness has not the original application before him.

2. Because the written application is the best evidence of its contents, and the questions seek to elicit testimony that tends to vary the writing.

183 Defendants objects to the questions embraced in the seventh interrogatory upon the grounds:

1. That the witness should have before him the original application before testifying with reference thereto.

2. That the application referred to is in writing and the testimony sought tends to vary the said written application.

3. That they are irrelevant, immaterial and not pertinent to the issues.

Defendant objects to the questions embraced in the eighth interrogatory upon the grounds:

1. That the witness should have the original application before him before testifying with reference thereto.

2. That the application is in writing, and the testimony sought to be elicited tends to vary this writing.

3. That said questions are irrelevant, immaterial and not pertinent to the issues.

4. (To "a.") That it is leading.

Defendant objects to the questions embraced in the 10th interrogatory upon the grounds:

1. That they are irrelevant, immaterial, and not pertinent to the issues.

2. That the application is in writing and the testimony sought tends to vary this writing.

Defendant objects to the questions embraced in the eleventh and twelfth interrogatories upon the grounds:

1. That the witness is asked to testify regarding the application, without the use of the original application.

184 2. That the testimony sought tends to vary the written application, which written application shows the time and place of making same.

3. That said questions are irrelevant, immaterial and not pertinent to the issues.

Defendant objects to the questions embraced in the thirteenth and fifteenth interrogatories upon the grounds:

1. That the witness is requested to testify relative to the application, without having the original application before him.

2. That the application is in writing, and the testimony sought tends to vary the writing, which speaks for itself.

3. That the testimony sought is irrelevant, immaterial and not pertinent to the issues.

Defendant objects to the questions embraced in the sixteenth interrogatory upon the grounds:

1. That the witness has not the original application before him, but is requested to testify from a copy or photograph.

2. That said questions are irrelevant, immaterial and not pertinent to the issues.

Defendant objects to the questions embraced in the seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second and twenty-third interrogatories, upon the grounds:

1. That they are irrelevant, immaterial and not pertinent to the issues.

2. That they seek to elicit testimony which is hearsay.

3. That the knowledge of the witness Hogue, who took the application referred to, that said Wiggins had been operated on, or had been to Hot Springs, Ark., in search of health, or had been to Atlanta, Ga., to consult Dr. Calhoun, or to Pensacola, to consult Dr. Thigpen, or had consulted Dr. Dey, or had consulted doc-

185 tors generally, or that he had suffered from indigestion, or that he had applied for insurance previously which he had

not received, is not such knowledge as is chargeable to the def
ant unless communicated, and to the same effect as to the knowl
of J. D. Torrey.

Subject to the foregoing objections the defendant propounds
following cross-interrogatories:

1.

Q. Did you importune Wiggins to take life insurance any
ardently than you usually had been in the custom of doing
others to whom you sold life insurance? Is it not a fact tha
selling insurance you generally succeeded only after such effo

A. Yes, I was compelled to use very much more effort tha
usually necessary, even in cases of this kind. It is a fact that
not easy to write insurance generally, but this was a rarely ex
tional case upon which I expended every bit of ability I was ca
of.

2.

Q. Is it not true that Wiggins lived at Pine Barren, that
contracts of insurance sued upon were finally disposed of thr
the Jacksonville, Fla., office of the Mutual Life Insurance C
pany, and the premiums transmitted to Cecil Wilcox, the ge
agent of this defendant company at Jacksonville?

A. It is true that Mr. Wiggins lived at Pine Barren, Flo
It is also true that because of the fact that Mr. Wiggins did li
the State of Florida the company seen fit to issue this busi
through the Florida agency, and had the premiums payable t

3.

Q. If Wiggins signed the application in the State of Alab
is it not true that it was purely accidental, for the reason tha
was merely passing from a point in Alabama to a point in Flo
and you chanced to meet him on the train?

186 A. It is a fact that Mr. Wiggins signed this applica
in Flomaton, Alabama, because of the fact that I met
Wiggins in Alabama; took the matter up with him and sold
this insurance in Alabama. I made no appointment with Mr. W
gins to meet him in Alabama.

4.

Q. Is it not a fact that the application was not completed u
the medical examinations were made, and that they were mad
the State of Florida? Is it not a fact that Wiggins signed that
of the application known as the medical examiner's report at
Barren, Florida, or somewhere in the State of Florida?

A. The application having nothing whatever to do with the m
ical examiner's report, was completed and signed in Flomaton,
bama. The medical examiner's report he could not logically
until after the examinations were made, and they were made at
home in Pine Barren, Florida.

5.

Q. Is it not a fact that you transmitted the application to Dr. Kilpatrick at Pine Barren for completion?

A. I sent the medical examiner's report to Dr. Kilpatrick; the application I had previously completed myself.

6.

Q. Is it not a fact that the answers and statements contained in the application were put there (whether before or after signing) at the request of Mr. Wiggins, and were sanctioned and approved by him?

A. It is a fact that the answers and statements contained in the application were put there before signing at the request of Mr. Wiggins, and were sanctioned and approved by him.

7.

Q. Is it not a fact that Mr. Torrey, the agent of the Mutual Life Insurance Co., at Mobile, told you that this was Florida
187 business, and that it would necessarily go through the Jacksonville office?

A. No. Mr. Torrey did not tell me that it would have to go through Jacksonville office.

8.

Q. Please state positively whether or not in answering the interrogatories, both direct and cross, you are doing so from a personal knowledge of the fact testified to, or as information upon which you have based your testimony from some other person? If you say that some of the matters testified to are based on information obtained from others and not personal knowledge of the fact, please specify in detail and specifically the answers which are given from knowledge derived from others?

A. My answers to the direct interrogatories and also the cross-interrogatories are all based on my personal knowledge of the facts of this case except in a few minor details where the answers give the source of my information.

9.

Q. Where have you been since March, 1910?

A. I was in Mobile, Alabama, until about July 1st, 1910, when I came North to Frostburg, Philadelphia, and numerous other places.

Q. Do you know Mr. Chas. G. Watson, of Frostburg, Md.? If so, how long have you known him? How many times in the last twelve months have you been in Frostburg, Md.? Have you or not seen Mr. Chas. G. Watson frequently in the last twelve months? If frequently, about how often?

A. I met Mr. Watson, personally, for the first time yesterday. I have been in Frostburg, Md., within the last twelve months about

fifteen times. Yesterday was the first time that I have ever seen Mr. Watson.

11.

Q. Did you know that several months ago a commission issued to take your deposition and Mr. Watson was named as com-
188 missioner therein, and that you never appeared to testify in answer to interrogatories attached to that commission? Please state why you did not testify if you knew of the existence of the commission to take your deposition?

A. I did know that a commission was issued to Mr. Watson, and he was authorized to take my deposition several months ago. I heard that Mr. Watson was inquiring for me several times, but in traveling and on my trips to Frostburg, I was busy, rushed for time, and left before I could conveniently look him up.

12.

Q. State any other matter or thing which may be of benefit to either party to this suit?

A. I know of nothing further than I have stated that will be of any benefit to either party in this suit.

JOHN C. HOGUE.

Sworn to and subscribed by the said John C. Hogue before me, this 12th day of January, 1912.

CHAS. G. WATSON. [L. S.]
Commissioner.

Indorsed: From Chas. G. Watson, Frostburg, Md., to F. W. Marsh, Clerk U. S. Dis. Court, Pensacola, Florida. Filed January 17, 1912. F. W. Marsh, Clerk.

189 And the plaintiffs, further to maintain the issues in their behalf, introduced in evidence the deposition of J. R. TAPIA, which deposition was given in pursuance of a commission issued by said Court, and which said deposition was duly filed and published in said cause, and read to the jury, and was in the words and figures following:

COPY BOUND TO

In the United States Circuit Court, Northern District of Florida, at Pensacola.

L. HILTON GREEN and W. A. FINLAY, JR., as Executors of C. L. Wiggins, Deceased,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Deposition of Witness, Produced, Sworn, and Examined on the 9th day of January, 1912, at the office of J. R. Lyons, in the State of Alabama, by virtue of the annexed commission, issued out of the clerk's office of the District Court of the United States for the Northern District of Florida, to me directed, for the examination of the said witness in a cause there depending between L. Hilton-Green and W. A. Finlay, Jr., as executors of C. L. Wiggins, deceased, and Mutual Life Insurance Company of New York, on the part of the plaintiffs.

J. R. TAPIA, of Mobile, Alabama, being duly sworn, deposeth and answereth as follows, viz.:

Direct Interrogatories.

By Messrs. BLOUNT & BLOUNT & CARTER and NIEL MCCARRON:

1.

Q. (*a*) What is your name, age, residence and occupation?

A. (*a*) My name is Joseph R. Tapia. I am generally known as J. R. Tapia. I am fifty years of age. I reside in Mobile, Mobile County, Alabama, and am manager for the Prudential Insurance Company of America in south and southeast Alabama. My duties are to solicit life insurance and generally to collect for and transact the business of a life insurance manager of a district agency.

190 —. (*b*) How long have such been your residence and occupation?

A. (*b*) I have resided in Mobile practically all of my life, and my occupation has been as above stated for twelve years.

2.

Q. (*a*) Did you, or not, have any connection with, or part in, filling out applications signed by C. L. Wiggins, for $30,648.00 of life insurance, upon which policies were afterwards issued by the defendant insurance company?

A. (*a*) I did not have any connection with, or part in, filling out applications signed by C. L. Wiggins for $30,648.00 of life insurance, upon which policies were afterwards issued by the Mutual Life Insurance Company of New York.

Q. (*b*) Look at the photographs marked "A" and "B" hereto attached, and state whether you recognize them as photographs of originals which you have seen?

LOSE IN CENTER

A. —. I have looked at the photographs marked "A" and "B" and attached to the direct interrogatories propounded to me, and I recognize them as the photographs of original applications which I have seen.

3.

Q. (*a*) In whose handwriting are the answers to questions 1 to 22, and the words "December 15th," shown by photograph "A"?

A. (*a*) The answers to questions one to twenty-two and the words "December 15th" shown by photograph "A" are in the handwriting of J. C. Hogue.

Q. (*b*) In whose handwriting are the same answers as shown on photograph "B"?

A. —. The same answers as shown on photograph "B" are in the handwriting of J. D. Torrey.

Q. (*c*) If you say that the former are in the handwriting of J. C. Hogue, state when and where he wrote said answers?

A. (*c*) J. C. Hogue wrote the answers to questions one to twenty-two and filled out the application, of which Exhibit "A" is a photographic copy, in my office in Mobile, Alabama, in the Bank of Mobile Building in December, 1908.

191 Q. (*d*) Were they or not written in your presence?

A. (*d*) They were written in my presence.

Q. (*e*) If you state who wrote the letter, state when he wrote them?

A. (*e*) The answers as shown in the photographic copy, which is Exhibit "B" attached to the direct interrogatories to me, were, as aforestated by me, written by J. D. Torrey in my office in Mobile, Alabama, in the Bank of Mobile Building. They were written in my presence in December, 1908.

Q. (*f*) And when?

A. (*f*) They were written in December, 1908.

Q. (*g*) And at whose request?

A. (*g*) They were written by Torrey at the request of J. C. Hogue. That is to say, the application was filled out by Torrey at the request of Hogue.

Q. (*h*) Where did he get the information contained in the answers written by him?

A. (*h*) Torrey got his information contained in the said answers from J. C. Hogue. He copied from the application taken by J. C. Hogue, a copy of which original application is the photographic copy attached to the direct interrogatories to me, which is Exhibit "A." Torrey also corrected the figures in the original application, a photographic copy of which is Exhibit "A." As written by Hogue, the figures were $30,000.00 even. Torrey changed them as shown in the application a photographic copy of which is Exhibit "A." After being changed by Torrey, they read $30,648.00. The original application, a photographic copy of which is Exhibit "A," when Hogue submitted it to Torrey to copy from, showed that it was dated at Mobile, Alabama, December 15th, 1908. Torrey erased Mobile, Alabama, and wrote in lieu "Pine Barren, Fla."

4.

Q. —. When the said applications were so filled out, to whom were they delivered?

A. (*a*) After the applications had been so filled out, they were delivered to J. D. Torrey.

Q. (*b*) If you say that they were delivered to J. D. Torrey, state what relation he had to the defendant insurance company at said time?

A. (*b*) J. D. Torrey, at that time, was district manager at
192 Mobile, Alabama, of the Mutual Life Insurance Company of New York.

Q. (*c*) Where was he at said time?

A. (*c*) At that time he was in my office in the Bank of Mobile Building, Mobile, Alabama.

Q. (*d*) Did he or not sign the said applications in your presence?

A. (*d*) Both of the applications were signed, in my presence, by J. D. Torrey, as soliciting agent.

Q. (*e*) If so, when?

A. (*e*) December 15th, 1908.

Q. (*f*) Was Wiggins present at said time?

A. (*f*) Mr. Wiggins was not present at the time.

5.

Q. —. Do you know whether J. D. Torrey had been informed, at the time when he received the said applications, and the medical examiner's reports, or thereafter, before he transmitted them to the defendant, that Wiggins had been — a sanitarium in Montgomery, and had been operated on by Dr. C. A. Thigpen for an inverted tooth?

A. (*a*) I do not know whether or not J. D. Torrey had been informed, at the time when he received the said applications and the medical examiner's reports, or thereafter, before he transmitted them to the defendant, that Wiggins had been in a sanitarium in Montgomery and had been operated on by Dr. C. A. Thigpen for an inverted tooth.

6.

Q. (*a*) Do you know whether the said J. D. Torrey had been informed at the time when he received the said applications and medical examiner's reports, or thereafter, before he transmitted them to the defendant that Wiggins had in November, 1908, made application to the Prudential Life Insurance Company of America for insurance upon his life to the extent of forty thousand ($40,000.00) dollars, and that no policy, or policies, had been issued upon, or in pursuance of, said application?

A. (*a*) I do not know that the said J. D. Torrey had been informed at the time when he received the said applications and
193 medical examiner's reports, and before he transmitted them to the defendant, the Mutual Life Insurance Company of New York, that Wiggins had in November, 1908, made application to the

Prudential Insurance Company of America for insurance upon hi life, and that no policy or polic s had been issued upon or in pursu ance of said applications.

Q. (*b*) If he had been so informed, then state?

Q. (*c*) From whom did he obtain such information?

A. (*b* and *c*) I can best answer *b* and *c* together. I informe J. D. Torrey that the Prudential Insurance Company of America ha refused to issue a policy and told him further that the only reaso why the company would not issue the policy was that Pine Barre Fla., was in a part of the company's restricted territory.

Q. (*d*) And when?

A. (*d*) I told him this prior to the time of the application which said Exhibits "A" and "B" are photographic copies. Thi was some time in December, 1908, prior to the 15th of December.

Q. (*e*) And where?

A. (*e*) The information was given in Mobile, Alabama, in m office in the Bank of Mobile Building.

7.

Q. State anything else that you may know to the benefit of eith of the parties to this suit?

A. (*a*) The original applications, of which Exhibits "A" and "B are copies, were both signed by C. L. Wiggins. One of them w filled in by Hogue and the corrections made by Torrey, as herei before mentioned. The other was filled in by Torrey.

(Sgd.) J. R. TAPIA.

Sworn to and subscribed before me this 9th day of January, 191

J. H. LYONS, *Commissioner.* [L. S.]

Cross-interrogatories to be Propounded to J. R. Tapia, a Materi Witness for the Plaintiffs.

EMMETT WILSON, Att'y for Defendant:

194 The defendant objects to the third interrogatory upon th grounds:

1. That a proper predicate had not been laid which would autho ize the witness in testifying as to the handwriting in the applicatio referred to.

2. Because the witness before testifying to the handwriting in t application should inspect and have before him the original appl cation.

3. Because the question is irrelevant, immaterial, and not pertine to the issues.

Defendant objects to the fifth and sixth interrogatories upon t grounds:

1. That it is irrelevant, immaterial, and not pertinent to the issu

2. That it seeks to elicit hearsay testimony.

3. That it is immaterial whether J. D. Torrey knew that Wiggi

had been in a sanitarium or not, or whether he had applied for insurance in the Prudential Insurance Company or not.

Subject to the foregoing objections, the defendant propounds the following cross-interrogatories to the witness:

1.

Q. Have you testified from a personal knowledge of the facts to which you testified, or from information given you by others? If any of your testimony is not based on personal knowledge, state which answers, both in the direct and cross, are based upon information only?

A. I have testified of my own personal knowledge of facts. All of my answers are based upon my own personal knowledge.

195

2.

Q. State any other matter or thing that may be material or of benefit to either party to this suit?

A. I do not know any other matter or thing that may be material or be of benefit to either party to this suit.

J. R. TAPIA.

Subscribed and sworn to before me the 9th day of January, 1912.

J. H. LYONS, *Commissioner.* [L. S.]

Indorsed: In U. S. District Court. Green et al. vs. Mutual Life Insurance Co. Filed Jan. 6, 1912. F. W. Marsh, Clerk.

Indorsed: Deposition of J. R. Tapia. L. Hilton-Green and W. A. Finley, Jr., as executors of C. L. Wiggins, Deceased, vs. Mutual Life Insurance Company of New York. In the United States District Court. J. H. Lyons, Commissioner. Returned and filed Jan. 10, 1912. F. W. Marsh, Clerk.

After the taking of the evidence and the argument of counsel, and before the jury retired, the Court gave the jury the following charge of his own motion, which is the whole charge given by the Court, and was in the words and figures following:

This case, gentlemen of the jury, was argued to you yesterday, and I will submit to you this morning these charges.

This is an action brought by the executors of Cilbey L. Wiggins against the Mutual Life Insurance Company of New York, on policies of insurance issued by that company on the application of Cilbey L. Wiggins, in his lifetime.

The basis of the action is a contract between Wiggins and the Life Insurance Company, and the application, with the questions propounded by the company, and the medical examiners, and the medical examiners' report, with Wiggins' answers thereto, together with the promises and obligations of the company expressed in the

196 policy to pay Wiggins' beneficiaries on his death, constitute the contract between the parties.

The contract of insurance in this case as expressed by the policies,

embraces the statements and representations of Wiggins, the deceased, made to the agent, Hogue, or to Kilpatrick, or Turberville, the medical examiners. Such statements were required to be truthfully made, and was a condition for the issuance of the contract, and this contract provides that all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties. Then the representations made by Wiggins in his application for insurance had been rejected; or whether he had been treated in a cure, sanitarium or hospital; or whether he had undergone a surgical operation; or whether he had had any illness or disease; or whether he had consulted a physician for his health, to serve as a defense by the company to this action, depends on whether such statements were knowingly false and fraudulently made.

If Wiggins knew they were false, and that he made them with the fraudulent purpose of obtaining the policy of insurance, then such statements would avoid the policy and would serve as a good defense by the company; provided, that the company at the time it accepted the application of the deceased as in insurance risk, had no knowledge of the falsity of the statements and representations made by Wiggins in his application for insurance.

The knowledge of the agent of the insurance company would be knowledge of the company, and if the agent representing the company in taking the application, or the statements of the medical examiners had knowledge of the falsity of the statements, then the insurance company would be estopped from setting up such false statements or misrepresentations of which they had knowledge before the issuance of the policy as a defense to this action.

To the action on the contract, the defendant Life Insurance Company, has pleaded several defenses as reasons why it should not pay the value of the policies to the plaintiff. The defenses in brief, are substantially this, that Wiggins made false statements in the application to the company for his insurance, that the false statements
197 were material and induced the company to write the policies, and the false statements were:

First, Wiggins stated that he had not consulted a physician about his health during the five years preceding his examination, whereas in truth and in fact he had consulted physicians.

Secondly, that Wiggins said in his application that he had never made application for insurance which was not issued as applied for, whereas, in truth and in fact he had applied for insurance within five years, which had not been issued.

Thirdly, that Wiggins said in his application that he had had no illness, disease or accident since childhood, except pneumonia, from which he had completely recovered, when in truth and in fact, he had indigestion and a weak and diseased heart.

Fourthly, that Wiggins said in his application to the company that he was in good health at the time of the application, when in truth and in fact he was not in good health.

Fifthly, that Wiggins certified in his application to the company that he had been examined on the application he was then making, by Doctors Kilpatrick and Turberville, whereas in truth and in

'act he was only partially examined by Doctor Kilpatrick and ıot at all by Dr. Turberville.

Sixthly, that Wiggins said in his application that he had never ɔeen treated in a sanitarium, hospital, or cure, whereas in truth ınd in fact, he had been treated in a sanitarium.

Seventhly, that Wiggins had said in his application that he ad never undergone any surgical operation, whereas in truth ınd in fact he had had his jaw operated on.

These are the reasons which the defendant company has stated s defenses, why it should not pay the policies.

The plaintiffs reply to these defenses by saying that the com- ɔany knew before it issued the policies that Wiggins had been reated for, and suffered from, indigestion, and had a weak heart, and had been operated upon for a cyst in the jaw.

98 That the company knew before it issued the policies that Wiggins had consulted physicians; that the company knew efore it issued the policies that Wiggins had visited Hot Springs, ırkansas, and Montgomery, Alabama, for his health. And that ıe company knew that Dr. Turberville had not examined Wiggins ı the application in question, and knew before it issued the policy ıat Wiggins had made application to the Prudential Life In- ıranee Company for a policy, and that the policy had not issued ıereon.

These, gentlemen, are the issues between the parties which you re called upon to determine from the evidence adduced before you ı the trial, which was read to you at length yesterday. The pleas f the defendant are affirmative pleas, that is, the things that it lleges as going to avoid the policy, that is the alleged fraudulent atements of Wiggins, and the burden is on the defendant com- ıny to maintain the truth of these defenses by a preponderance f the evidence, that is, as to the falsity of these alleged statements f Wiggins', and that Wiggins actually made such statements the ırden is upon the defendant company to prove by a preponderance f the evidence.

The law with regard to contracts of life insurance is, that the ɔplicant, when required to state his condition, the condition of his ealth past and present, must state the facts as to all material in- uiries, truthfully and honestly. A material inquiry would be one ɔncerning the truth of which, it would be important for the com- ıny to know, and one likely to influence its action on the applica- ɔn for insurance, and if the applicant answers a material question ntruthfully, with a fraudulent purpose, that is, with intent to eceive the insurance company, such untruthful statement would oid the policy.

Under the terms of the policy in this action, it is stipulated that l statements made by the insured shall, in the absence of fraud, deemed representations, and not warranties. Therefore, in the sence of fraud, no statement made by Wiggins in the application, though untrue, to any immaterial matter, would avoid the policy, ıd no false statement made by him which was not material to the quiry, that is, which did not induce the company to issue the

policy, or one which Wiggins did answer with fraudulent
199 intent to procure the policy, can be relied on by the company as a defense to this action.

That is to say, if you believe from a preponderance of the evidence, that Wiggins when he answered the questions whether he had consulted a physician as to his health within five years and that he had no illness since childhood except pneumonia, and that he had never been treated in a sanitarium, or had never undergone a surgical operation, and certified on his application that he had been examined by Dr. Turberville, when he had not, and that he had never applied for insurance which had not been issued, when he had, and knew they were false, and were made by Wiggins when he was conscious of their falsity. That is, if he knew he was in a bad condition of health, that he had been treated in a hospital for his health, and had a surgical operation for a condition affecting his health, and certified that he had been examined by Turberville when he had not, and these answers were made with intent to deceive the company as to matters inquired about, and for a fraudulent purpose, and that the company would not have issued the policies but for the misrepresentations, then the policies would be void, and the plaintiffs could not recover in this action. But, to avoid the policies on these grounds you must find from the evidence that Wiggins made the false representations charged, and that he made them fraudulently, that they were material, and that there were in fact illnesses, diseases of the heart, indigestion and a surgical operation, and that he had consulted physicians, and had certified that he had been examined by Dr. Turberville. These things, you must find affirmatively, and the Court charges you that although you find all of these things from the evidence, in favor of the defendant, yet if you believe from the evidence that the defendant knew of the falsity of all these alleged misstatements when it accepted the application, then you will find against the company on these defenses.

If you find from the evidence that the statements of Wiggins in the several matters inquired about his health and operation and treatment in a sanitarium were false, and further find that the agents Hogue, and Torrey and Turberville knew they were false, and you further find from the evidence that there was an understanding, tacit or expressed, between Wiggins and the said agents
to procure the policies by collusive co-operation to conceal
200 the truth from the company as to the several matters inquired about, then such conduct upon the part of Wiggins would avoid the policies, and the plaintiffs could not recover in this action.

If you find that Turberville knew that he had not made an examination of Wiggins, or propounded any question to him, and that Wiggins had misstated the facts when he certified that his answers were correctly recorded by the medical examiner, then if you find from the evidence that Turberville was such an agent of the company as to bind it by his, Turberville's knowledge, and that the defendant knew of such false certificate, in that case the defense

of the defendant, based upon said alleged false representations, cannot be sustained. But if Wiggins knowingly signed the certificate in blank, which purported to contain the answers to the medical examination by Doctor Turberville and before his answers had been inserted therein, it was a material representation and binding on him, and if false, would avoid the policy, unless the company through its medical examiner, Turberville, had knowledge that the certificate was false, if it was signed by Wiggins in blank in collusion or under an express or tacit understanding with Turberville that Wiggins was not to make the answers, then it would be such a false representation as to avoid the policy.

In determining whether the defendant knew the facts as stated in the last given instruction, it is not necessary that you should find that any of the chief officers of the defendant so knew. It is only necessary that you should find that an agent whose knowledge would be the knowledge of the defendant, did so know.

If there have been conflicts between the witnesses who have testified in this case, gentlemen, it is your province to reconcile them with truth, if you can do so, ascribing to each witness the intention of telling the truth, but if you find conflicts so serious and grave as to material matters testified to by different witnesses, that you cannot reconcile, then it is your province to accept that testimony which you believe to be truthful, consider the testimony as it appears to you in connection with all the other testimony in the case, applying your experience as business men of affairs, you are at liberty to discard that which you deem unworthy of credit and accept that which more comports with reason and your own experience and all the other testimony in the case.

201 You are the sole and exclusive judges of the weight of the evidence and the credibility of the witnesses; you have seen some of them testify, and have observed their manner upon the stand. The greater portion of the evidence in this case was by depositions, and you should consider these depositions, their effect upon you should be just as of witnesses testifying in your presence; you should reconcile the conflicts if you can, if you cannot, then accept that which you deem worthy of credit and discard that you find unworthy of belief.

By agreement of counsel as to a finding in favor of the plaintiffs in this cause, if you find for the plaintiffs, your verdict would be $30,648, with interest at the rate of eight per cent. from the date of bringing suit, with 12½ per cent. upon the principal and interest for attorneys' fees.

If you find for the defendant, the form of your verdict should be: We, the jury, find for the defendant. As to the knowledge of the medical examiner which I have practically charged you under the statute laws of Florida, would be agents of the company, and any fact of which they had knowledge, that fact would be imputable to the company; but the knowledge of the medical examiner under the facts in this case as to the facts not set forth in the medical examiner's report is not chargeable to the insurance company.

Mr. WILSON: I except to the failure of the Court to give each of

the charges requested by the defendant, and I also except to that portion of the Court's charge where it was stated, "that a misrepresentation in order to be a defense must not only *by* [be] false, but also fraudulently made.

I except to that portion of the Court's charge where Hogue is referred to as an agent of the company.

I except to that portion of the Court's charge where it is stated, "the agent's knowledge under the facts in this case will bind the company."

I except to every part of the general charge where it is stated that the misrepresentations in order to be defenses must have been fraudulently made.

I except to that portion of the general charge where it is stated, that the knowledge of Turberville as medical examiner is imputable to the company, and also to the refusal of the Court to give the charges refused.

202 Mr. BLOUNT: We except, may it please the Court, to the refusal of the Court to give charge "A," 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12; separately and severally.

And thereupon, before the argument of counsel began, and before the retirement of the jury, the defendant requested the Court to charge the jury as follows:

The defendant moves the Court to direct a verdict in its favor, because:

1. The evidence shows without contradiction that Wiggins made a false material statement in the application for insurance, relative to the fact of the consultation of physicians during the five years preceding the application.

2. Because the evidence shows without contradiction that Wiggins untruthfully stated in his application that he had not consulted a physician within five years next preceding the date upon which the application was made.

3. Because the evidence shows without contradiction that Wiggins untruthfully made the statement that he had not applied for insurance in any other company, which insurance had not been issued upon the plan and premium rate proposed.

4. Because it is shown without contradiction that Wiggins stated that he had never made application for insurance which had never been issued as applied for, and that no such application for insurance was then pending undisposed.

5. Because the evidence shows without contradiction that Wiggins falsely reported to the defendant that he had had no illness, disease or accident since childhood, except pneumonia, from which he had recovered.

6. Because the evidence shows without contradiction that Wiggins stated in his application for insurance sued upon that he had not been in any asylum, cure or hospital, when in truth within several months before the date of the making of said ap-

203 plication he had been an inmate of a sanatarium, and had been operated upon in a sanatarium.

7. Because the evidence shows that Wiggins stated to the de-

fendant in said application that he was in good health, when in fact it is shown that he was not in good health at the time of the making of said application.

8. Because the evidence shows without contradiction that Wiggins reported and certified to the defendant that he had been examined by Dr. Kilpatrick and Dr. Turberville upon this application for insurance, when in fact it is shown that Dr. Kilpatrick made only a partial examination and that Dr. Turberville made no examination whatever.

But the Court refused to give such charge, to the refusal of the Court to give such charge, the defendant, before the retirement of the jury, then and there excepted.

And thereupon, before the argument of counsel began, and before the retirement of the jury, the defendant requested the Court to charge the jury as follows:

1. The evidence in this case shows that the agent Hogue who wrote the application and solicited the insurance which was issued to Wiggins, was not a regular or general agent of the Mutual Life Insurance Company, but only an insurance broker; hence, the Court instructs you that Hogue's knowledge of the falsity of the representations, if any, made by Wiggins, is not chargeable to the defendant company, and it is not bound by such knowledge on the part of Hogue.

But the Court refused to give such charge, to the refusal of the Court to give said charge, the defendant, before the retirement of the jury, then and there excepted.

And thereupon before the argument of counsel began, and before the retirement of the jury, the defendant requested the Court to charge the jury as follows:

2. The Court instructs you that if you find from the evidence that the agent and medical examiners of the defendant com-
204 pany knew of the false representations, if any, made by Wiggins, and that they colluded with Wiggins to procure this insurance, then such knowledge on their part is not chargeable to the defendant company, and it is not bound thereby.

But the Court refused to give such charge, to the refusal of the Court to give such charge, the defendant, before the retirement then and there excepted.

And thereupon before the argument of counsel began, and before the retirement of the jury, the defendant requested the Court to charge the jury as follows:

#—. The Court instructs you that if you find from the evidence that the agent and medical examiners who acted for the company in this instance knew of the falsity, if any, of the answers and representations made by Wiggins, and purposely failed to notify the company of such falsity of said representations and answers, then they became the agents of Wiggins in the perpetration of this wrong, and the defendant company is not bound by their knowledge.

But the Court refused to give such charge, to the refusal of the Court to give said charge, the defendant then and there before the retirement of the jury excepted.

And thereupon before the argument of counsel began, and before the retirement of the jury, the defendant requested the Court to charge the jury as follows:

4. The Court instructs you that the agent and medical examiners of the defendant company may have known at the time the application was made that Wiggins had been in ill health and was in ill health at the time of the making of said application, but that such knowledge of such agent and medical examiners was not binding on the defendant insurance company unless it is further shown by the evidence that said agent or medical examiners, or one of them, notified the company *it* [at] its home office, or through a general agent, and such knowledge of said agent or medical examiners is not chargeable to the company unless it was so imparted to the company.

205 But the Court refused to give such charge, to the refusal of the Court to give said charge, the defendant, before the retirement of the jury, then and there excepted.

And thereupon before the argument of counsel began and before the retirement of the jury, the defendant requested the Court to charge the jury as follows:

5. The Court instructs you that although the agent and medical examiners of the Mutual Life Insurance Company may have known at the time the application was made, that said Wiggins had consulted physicians within five years next preceding the making of the application, that such knowledge of such agent or medical examiners does not bind the defendant insurance company unless it is further shown that said agent or medical examiners notified the defendant company at its home office, or otherwise, in such manner that it reached the officers at the home office, and such knowledge of said agent or medical examiners is not chargeable to the company unless information thereof was so imparted to the company.

But the Court refused to give such charge, to the refusal of the Court to give said charge, the defendant before the retirement of the jury, then and there excepted.

And thereupon the defendant, before the argument of counsel began and before the retirement of the jury, *the defendant* requested the Court to change the jury as follows:

6. The Court instructs you that if you believe from the evidence that Wiggins understood that two medical examinations were required by rule of the company, and that he certified to two examinations by separate physicians and that the answers he made to each were correctly recorded, and you find further from the evidence that such certificate or statement by the said Wiggins was untrue, and in fact that he had not been examined by two separate physicians, you will find for the defendant.

But the Court refused to give such charge, to the refusal of
206 the Court to give said charge, the defendant before the retirement of the jury, then and there excepted.

And thereupon, before the argument of counsel began and before the retirement of the jury, the defendant requested the Court to charge the jury as follows:

7. The Court instructs you that if you believe from the evidence that Wiggins certified to the defendant company that he had been examined by Dr. Kilpatrick and that said Kilpatrick had correctly recorded the answers, and that he had been examined by Dr. J. S. Turberville, and that the said Turberville had correctly recorded his answers, and you find further that either one, or both, of said doctors did not make such examination, you will find for the defendant.

But the Court refused to give such charge, to the refusal of the Court to give such charge, the defendant, before the retirement of the jury, then and there excepted.

And thereupon, before the argument of counsel began, and before the retirement of the jury, the defendant requested the Court to charge the jury as follows:

8. The Court instructs you that the inquiry of the defendant contained in the application which Wiggins signed, with reference to the consultation of the physicians, was a material inquiry, and that if Wiggins falsely answered said inquiry, the policy is avoided, and your verdict should be in favor of the defendant.

But the Court refused to give such charge, to the refusal of the Court to give such charge, the defendant, before the retirement of the jury, then and there excepted.

And thereupon, before the argument of counsel began, and before the retirement of the jury, the defendant requested the Court to charge the jury as follows:

9. The Court instructs you that the inquiry contained in the application and signed by Wiggins, asking him if he was in
207 good health was a material inquiry, and if he answered said inquiry untruthfully the policies sued upon are thereby avoided, and you should find for the defendant.

But the Court refused to give such charge; to the refusal of the Court to give such charge, the defendant, before the retirement of the jury, then and there excepted.

And thereupon, before the argument of counsel began and before the retirement of the jury, the defendant requested the Court to charge the jury as follows:

10. The Court instructs you that the inquiry contained in the application for insurance sued upon, asking Wiggins if he had undergone any physical examination, was a material inquiry, and if he answered said inquiry falsely, the policies sued upon are avoided and of no effect, and you should find for the defendant.

But the Court refused to give such charge, to the refusal of the Court to give such charge, the defendant, before the retirement of the jury, then and there excepted.

And thereupon, before the argument of counsel began, and before the retirement of the jury, the defendant requested the Court to charge the jury as follows:

11. The Court instructs you that the inquiry contained in the application for the insurance sued upon, asking Wiggins if he had ever been under treatment at any asylum, cure, hospital, or sanitarium, was a material inquiry, affecting the risk, and if Wiggins

answered same falsely the policies sue- upon are avoided and of no effect, and you should find for the defendant.

But the Court refused to give such charge, to the refusal of the Court to give such charge, the defendant, before the retirement of the jury, then and there excepted.

And thereupon, before the argument of counsel began, and before the retirement of the jury, the defendant requested the Court to charge the jury as follows:

208 12. The Court instructs you that the inquiry in the application for this insurance, asking Wiggins if he had ever been examined for a policy in any other company or association which was not issued as applied for, was a material inquiry effecting the risk, and if Wiggins answered same falsely the policies are avoided and of no effect, and you should find for the defendant.

But the Court refused to give such charge, to the refusal of the Court to give such charge, the defendant, before the retirement of the jury, then and there excepted.

And thereupon, before the argument of counsel began, and before the retirement of the jury, the defendant requested the Court to charge the jury as follows:

13. The Court instructs you that if you find from the evidence that Wiggins answered falsely a material inquiry contained in the application for his insurance, or made a false statement of a material matter and you find further that he made such false answer or statement carelessly or negligently, you must find that thereby he committed a fraud on the insurance company, and the policies issued under the application are thereby avoided and of no effect; in other words; if you find that Wiggins was grossly careless or negligent, in that he misrepresented material matters to the company, in law such conduct will be considered fraudulent and the policies sued on in this case thereby avoided as above stated.

But the Court refused to give such charge, to the refusal of the Court to give such charge, the defendant, before the retirement of the jury, then and there excepted.

And thereupon, before the argument of counsel began, and before the retirement of the jury, the defendant requested the Court to charge the jury as follows:

14. The Court instructs you that the medical examination attached to the application is a part of the application, and that the whole application in this case became a part of the contract of insurance and was incorporated in the several policies sued

209 upon; therefore, you are instructed that if Wiggins received the said policies and retained the same, he is presumed to have been familiar with the terms of said policies, including the statements and answers contained in the application, and further, if you find from the evidence that he did receive said policies and retained the same, and that the application incorporated in said policies contained false answers or statements relative to material matters affecting the risk, then Wiggins is presumed to have ratified the statements and answers which were written in said applications, whether they were truthful or untruthful, and if you find

that they were false to material matters the plaintiff cannot recover in this case, and your verdict must be in favor of the defendant.

But the Court refused to give such charge, to the refusal of the Court to give such charge, the defendant, before the retirement of the jury, then and there excepted.

And thereupon, before the argument of counsel began, and before the retirement of the jury, the defendant requested the Court to charge the jury as follows:

15. The knowledge of the medical examiners on the facts in this case, as to the facts not set forth in the medical examiner's report is not chargeable to the insurance company.

But the Court refused to give such charge, to the refusal of the Court to give such charge, the defendant, before the retirement of the jury, then and there excepted.

Said cause having been submitted to the jury under the charge of the Court and the evidence, aforesaid, the jury returned its verdict in favor of the plaintiff for the sum of $30,648.00, and interest at eight per cent. from the institution of said suit, and 12½ per cent. additional, as attorneys' fees for the plaintiffs' attorneys.

Inasmuch as said matters objected and excepted to, and insisted upon, and considered by the Court *for* not appear of record in said cause, said defendant did, within the time limited, prepare this, its bill of exceptions to the rulings of said Court and proceedings before him, and request him to sign same.

And due notice having been given to the plaintiffs, of the time and place of settling said bill of exceptions, and plaintiffs
210 and defendant having been heard, the foregoing bill of exceptions is hereby allowed and settled by the Judge who tried said cause, who, in evidence thereof, doth sign his name officially, on the 14th day of June, A. D. 1913.

WM. B. SHEPPARD,
Judge of the United States District Court,
Northern District of Florida.

This bill of exceptions was presented for allowance and settled, this the 14 day of June, A. D. 1913.

WM. B. SHEPPARD, *Judge.*

I consent to the signing of the above bill of exceptions, as correct, this 14 day of June, A. D. 1913.

BLOUNT & BLOUNT & CARTER,
Of Counsel for the Plaintiffs.

Indorsed: L. Hilton Green and W. A. Finlay, Executors of the Will of C. L. Wiggins, vs. Mutual Life Insurance Company of New York. Bill of Exceptions. Filed June 14th, 1913. F. W. Marsh, Clerk.

211 UNITED STATES OF AMERICA,
Northern District of Florida:

I, F. W. Marsh, Clerk of the District Court of the United States within and for the Northern District of Florida, do hereby certify, that the foregoing pages, numbered 1 to 241, both inclusive, contain a true and perfect transcript and copy of the record and proceedings in a case lately pending in said Court, wherein L. Hilton-Green and W. A. Finlay, Jr., as executors of the estate of C. L. Wiggins, deceased, were plaintiffs, and the Mutual Life Insurance Company of New York, a corporation, was defendant, and wherein the Mutual Life Insurance Company, aforesaid, is plaintiff in error, and the said L. Hilton-Green and W. A. Finlay, Jr., are defendants in error, made up in accordance with the stipulation of attorneys in record, as contained on pages 129 of said record, as the same remains on file and of record in said Court.

Witness my hand, and the seal of said Court, at the City of Pensacola, in said district, this the 17th day of June, A. D. 1913.

[SEAL.] F. W. MARSH,
Clerk U. S. District Court,
Northern District of Florida.

212 That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of January 5th, 1914.

No. 2532.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
versus
L. HILTON-GREEN and W. A. FINLAY, JR., Executors, etc.

On this day this cause was called, and, after argument by Emmett Wilson, Esq., and Philip D. Beall, Esq., for plaintiff in error, and W. A. Blount, Esq., for defendant in error, was submitted to the Court.

Opinion of the Court.

Filed February 17th, 1914.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 2532.

213 THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,

v.

L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased, Defendants in Error.

Error to the District Court of the United States for the Northern District of Florida.

This was an action to recover upon four policies of life insurance, issued by the plaintiff in error (defendant in the trial court) at one and the same time to the intestate. The suit was instituted in the Circuit Court of the First Judicial Circuit of Florida, and removed to the District Court of the United States for the Northern District of Florida. It was twice tried in that court, each
214 trial resulting in a verdict for the plaintiff for the amount of the four policies with interest and attorneys' fees.

The first judgment was reversed by this court because the policies sued on were erroneously held by the District Judge on the first trial to be Alabama contracts, which, under the statute of that state, made them non-contestable for any cause after two annual premiums had been paid. No other question was decided on the former appeal. The opinion of the court appears in the 202d Federal Reporter, 113.

Upon the second trial, to review the judgment in which the present writ of error is taken, the court below held that the Florida law governed the policies, and other questions only are now presented for decision. They arise entirely out of false statements alleged to have been made or ratified by the insured in the application for
215 the policies and in the reports of the two medical examiners of the defendant, and which the defendant contended avoided the policies. The alleged false answers related to the insured's present and past health history; as to previous illnesses, surgical operations, consultations with physicians, hospital treatment, etc.; also that he had been examined by the defendant's medical examiners, and that the examiners had correctly recorded his answers; and that he had never applied for other insurance and been rejected or his application not passed upon favorably. The alleged false statements were made the subjects of numerous special pleas by the defendant, to which the plaintiff replied by taking issue thereon and also by alleging knowledge of the falsity of the statements relied upon, on the part of the defendant, through its agents and examiners who were instrumental in writing the policies for

it. No questions with relation to the pleadings are assigne
216 as error. The errors relied upon relate altogether to excep
tions to the court's oral charge, and to the refusal of certai
charges requested by the defendant. There are twenty-three erro
assigned and relied upon for a reversal, all of which have been ex
amined by us. We feel that clearness of presentation will be accon
plished rather by a general statement of our views respecting the
than by a detailed consideration of each assignment.

George W. P. Whip, Emmett Wilson and Philip D. Beall, fo
plaintiff in error.

W. A. Blount, A. C. Blount, Jr., and F. B. Carter, for defendant
in error.

Before Pardee and Shelby, Circuit Judges, and Grubb, Distric
Judge.

GRUBB, District Judge, after stating the case, delivered the opinio
of the court.

The main questions considered on the trial in the cou
217 below, and about which the errors insisted upon here, relat
were (1) whether the alleged false statements must have bee
fraudulently made by the insured, in order to be availed of by th
insurer; (2) whether they must have been material to the risk t
have that effect; (3) whether they or any of them were, in fac
material to the risk; (4) whether knowledge of the falsity of th
statements made by the insured on which defendant relies, if prove
would be the knowledge of the defendant and estop it from assertin
the invalidity of the policies for that reason; and (5) whether th
defendant's agents or medical examiners are shown to have had suc
knowledge.

1. Each of the policies was alike in form and in its conditions an
provisions. Each contained this stipulation, "all statements mad
by the insured shall, in the absence of fraud, be deemed represent
tions and not warranties." When the language of a polic
218 by its terms excludes warranties, it would seem that it leave
false representations made by the insured with substantiall
the status that they would have with relation to the offence of obtai
ing money by false pretences. In order to avoid a contract of insu
ance, because a party to it was induced to enter into it by the fals
representations of the other party to it, it must be made to appea
that the representations were untrue; that they were known to b
untrue by the party making them; that they were material induc
ments to the party, to whom they were made, to enter into the co
tract; and that the party to whom they were made relied upon the
truth, which implies that he was unaware of their falsity.

In the case of Aetna Life Insurance Co. v. Outlaw, 194 Fed. 86
the Circuit Court of Appeals for the Fourth Circuit said of a polic
containing a like stipulation:

"It was decided by the Circuit Court of Appeals of the Eighth Ci

cuit, in the case of Rice v. Fidelity & Deposit Company of Maryland, 103 Fed. 427, 43 C. C. A. 270, that:

219 "'In insurance a representation is a statement by the applicant to the insurer regarding a fact material to the proposed insurance; and it must be not only false, but fraudulent, to defeat the policy. A warranty, in the law of insurance, is a binding agreement that the facts stated by the applicant are true. It is a part of the contract, a condition precedent to recovery upon it, and its falsity in any particular is fatal to an action upon the policy.'

"Accepting this as the definition of a representation, it follows that, in order for a representation, under the terms of this policy, to serve as a defense, it must have been knowingly false, and therefore fraudulent. Unless so knowingly false and fraudulent, it could not be availed of by the insurance company as a defense."

In the case of Pelican v. Mutual Life Insurance Co., 44 Montana 277, 199 Pac. 778, the court said:

"An application for a policy provided that all statements made by the insured should, in the absence of fraud, be deemed representations and not warranties, and that no such statement of the insured should avoid or be used in defense to a claim under the policy, unless contained in the written application, etc. It also recited that all of the answers to the medical examiner were true and were offered as inducements to the issue of the policy. Held, that answers to questions in the application as to insured's prior health history were representations and not warranties, and the falsity thereof would not avoid the policy unless fraudulent, under Rev. Codes 5043, providing that the language of the policy must be construed most strongly against insurer."

220 Section 5043, Revised Code, referred to in the citation and declaring that the language of the policy must be construed most strongly against the pleader, being merely declaratory of the rule of construction as to insurance policies in the absence of statute, does not diminish the weight of this authority.

In the case of Penn Mutual Co. v. Trust Co., 73 Fed. 653, Circuit Judge Taft held that where a representation was by a statute required to be made "in bad faith," to be available to the insurance company, nothing short of an actual intent to mislead or deceive would suffice; that a misstatement, honestly made, through inadvertence or even gross forgetfulness and carelessness, was not enough.

We are of the opinion that under the language of these policies, they could be avoided because of false representations made by the insured, only if such representations were fraudulently made,

221 i. e., with knowledge, actual or imputed, upon the assured's part of their falsity when he made them.

2. We also think that the false representations relied upon to avoid the policies must have been material to the risk, tending to influence the insurer to write the policies, when, if their falsity had been known to it, it might not have done so. The peculiar stipulation of the policies themselves excludes the idea that the representations made by the insured were to be considered warranties, unless they were fraudulently made. If not to be construed as warranties,

then, in order to avoid the policies, they must have been material to the risk.

In the case of Aetna Life Insurance Co. v. Outlaw, 194 Fed. 862-3, the Circuit Court of Appeals for the Fourth Circuit said:

"The distinction between a warranty and a representation in an application for an insurance policy has by a number of decisions been stated to be that, if the statements are warranted, they must be true in every particular, whether material or immaterial; whereas,
222 if the statements are representations, incorrectness in an immaterial matter will not avoid the policy, although if incorrect in a material matter, the policy will be avoided."

We hold that, under the language of the policies involved in this suit, the defendant, to avoid the policies for false representations, must establish their falsity, materiality, and the knowledge of the insured, actual or imputed, of their falsity.

3. So far as the alleged false representations related to the insured's previous and present condition of health, as to whether he had suffered from indigestion or from a weak and diseased heart, and whether he was then in good health, we think that the issues were properly left as questions of fact to the jury, both as to the falsity and as to the materiality of these representations. So we think the materiality of the omission of the insured to mention the history of the impacted tooth and the operation for its removal, and the visits of the insured to Hot Springs, Montgomery and Atlanta, in
223 pursuit of treatment for what turned out to be an inverted tooth, was a question for the jury to determine, under the evidence disclosed in the record.

This leaves for consideration the representation of the insured that he had been examined by Dr. Turberville, defendant's medical examiner, and that the answers recorded by the medical examiner in his report were correct. In truth, there was no such examination had, and the insured must have known that there was none, and the representation that there had been one was a material one. So with regard to the representation of the insured that there had been no previous application for insurance made by him and rejected or not passed upon favorably by the insurance company. This was untrue, must have been known to have been untrue by the insured when he made it, and it was material. Either of these two last representations would be sufficient to avoid the policies, unless the defendant is estopped to rely upon them, by reason of its knowledge of
224 their falsity. It had such knowledge, if at all, because of the knowledge of its agents and examiners, who handled the matter for it.

4. This brings us to the inquiry as to whether defendant is chargeable with the knowledge of its agents, Hogue and Torrey, and its medical examiners, Kirkpatrick and Turberville, who reported to it that they had examined the insured and facts indicating that he was an acceptable risk.

In considering this legal question, two facts, peculiar to this case, are to be noticed: (A) the effect of the Florida statute, and (B) the language of the policies sued upon.

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(A) Section 2765 of the General Statutes of Florida is as follows:
"SEC. 2765. Agents.—Any person or firm in this State, who re-
ves or receipts for any money on account of or for any contract
insurance made by him or them, or for such insurance company,
ociation, firm or individual, aforesaid, or who receives or receipts
money from other persons to be transmitted to any such com-
pany, association, firm or individual, aforesaid, for a policy of
insurance, or any renewal thereof, although such policy of
insurance is not signed by him or them, as agent or represen-
ve of such company, association, firm or individual, or who in
rwise, directly or indirectly, makes or causes to be made, any con-
ct of insurance for or on account of such insurance company, asso-
tion, firm or individual, shall be deemed to all intents and pur-
es an agent or representative of such company, association, firm
individual."

n the absence of such statute and under different language in the
icies, the case of New York Life Insurance Co. v. Fletcher, 117
S. 519, relied upon by the plaintiff in error, would seem con-
lling of this case. However, effect must be given to the statute,
l to the language of the policies.

n the later case of Continental Insurance Co. v. Chamberlin, 132
S. 304-310, the Supreme Court considered a similar statute of
a, and distinguished the case of Insurance Co. v. Fletcher, supra,
m one where such a statute controlled, and declined to apply the
rule laid down in the Fletcher case to the case then under their
consideration. The court said, referring to such a statute:

"This statute was in force at the time the application for
policy in suit was taken, and, therefore, governs the present case.
dispenses with any inquiry as to whether the application or the
icy, either expressly or by necessary implication, made Boak the
nt of the assured in taking such application. By force of the
ute, he was the agent of the company in soliciting and procuring
application. He could not, by any act of his, shake off the
racter of agent for the company. Nor could the company by any
vision in the application or policy convert him into an agent of
assured. If it could, then the object of the statute would be
eated. In his capacity as agent of the insurance company he
d up the application—something that he was not bound to do,
which service, if he chose to render it, was within the scope of
authority as agent. If it be said that, by reason of his signing
application, after it had been prepared, Stevens is to be held as
ing stipulated that the company should not be bound by his
bals statements and representations to its agent, he did not agree
t the writing of the answers to questions contained in the appli-
ion should be deemed wholly his act, and not, in any sense, the
of the company, by its authorized agent. His act, in writing
answer, which is alleged to be untrue, was, under the circum-
nces, the act of the company. If he had applied in person, to the
ne office, for insurance, stating in response to the question as to
er insurance the same facts communicated by him to Boak, and

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the company, by its principal officer, having authority in the
227 premises, had then written the answer 'No other,' telling the applicant that such was the proper answer to be made it could not be doubted that the company would be estopped to say that insurance in co-operative societies was insurance of the kind to which the question referred, and about which it desired information before consummating the contract. The same result must follow where negotiations for insurance are had, under like circumstances, between the assured and one who in fact, and by force of the law of the State where such negotiations take place, is the agent of the company, and not, in any sense, an agent of the applicant."

In the case of New York Life Insurance Co. v. Russell, 77 Fed. 94-104, the Circuit Court of Appeals for the Eighth Circuit said of the effect to be given the language of a policy as against a similar statute of Nebraska:

"The obvious purpose of this clause, like that which declared the agent of the insurance companies should be deemed the agent of the insured, is to enable the insurance company to escape from the necessary obligations and liabilities imposed by the law of agency on a principal who commits the conduct of his business to an agent. It is designed to evade a fundamental rule of the law of agency, and to shear its acknowledged agents of their appropriate and accustomed powers and duties, and impose them on the insured. If this application is to receive the construction contended for, no one can safely transact business with an agent of the company; for, while he would be bound by his acts and representations and any information
228 communicated to him by the agent, the company will not be bound by the acts or representations of its agent and any information communicated to him in the conduct of the business of his agency. Under such a rule, the rights and obligations of the contracting parties would not be reciprocal; contracts made with the company's agents would be one-sided; and the company could, at its own election, avail itself of the acts and representations of its agents when it was profitable to do so, and repudiate them when they were likely to prove burdensome. The company cannot play fast and loose in this manner. The persons who are authorized by the company to solicit insurance, take applications, or receive premiums in Nebraska are made by statute the agents of the company 'to all intents and purpose'; and it is not within the power of the company to shear these statutory agents of the powers and authority with which the law, for the protection of the public dealing with the company, invests them. These powers are precisely those which an agent of an insurance company possesses, upon whose powers and authority no special limitations have been imposed.

* * * * * * *

"Insurance companies perfectly understand the fact that these applications, which are framed by themselves, and furnished to their agents, are filled up, and the answers to the questions written down, by their agents, and that every applicant accepts without question the advice, direction, and assurance of the agents in all matters relat-

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g to the preparation of the application. This is a part of the duty such agents, and the applicant has a right to assume that they ll discharge it intelligently and honestly. He has a right to assume, also, that the agent will honestly and faithfully dis-
29 charge his duty to his principal. In this case it was the duty of the company's medical examiner to make the report called r by the clause of the application last quoted, if the answer to the uestion and the information communicated to the medical exam-er made such report necessary. This was a duty required of the edical examiner by the company. It would be unprecedented and nreasonable for an applicant to take into his own hands the prep-ation of the medical examiner's report, and, in doing so, disregard e express advice and direction of the company's medical examiner.

* * * * * * *

"Under the Nebraska statute, the agents and medical examiner of e defendant company were 'to all intents and purposes' the agents the company; and, in their respective spheres, they possessed all e powers and authority conferred on agents and medical examiners insurance companies by an unqualified appointment as such. It sults that the information communicated by the applicant to the mpany's agents and medical examiner was, in contemplation of w, communicated to the company itself; and the company, there-re, having issued the policy with knowledge of all the facts, will t be heard to defend upon the ground that these facts were not lly set out in the report of its agents or medical examiner. We ncur fully in the conclusion reached by the learned judge who ied the case at the circuit, whose opinion is inserted in the statement the case. The judgment of the circuit court is affirmed."

In view of the Florida statute, we think these two cases are con-olling of this case, rather than is the case of New York Life Insur-ance Co. v. Fletcher, which plaintiff in error relies upon.
30 The statute prescribes that every person who receives money for an insurance company in payment of a contract of insur-nce, or who directly or indirectly causes to be made any contract insurance, shall be deemed to all intents and purposes an agent or presentative of such company. Under this description, we think orrey, the defendant's Mobile manager, Hogue, the soliciting agent, nd the two medical examiners were agents of the defendant to all tents and purposes, and so, for the purpose of charging it with otice of what they knew, when the policies were written.

B. Again, the language of the policies in this case differs from at of the policy in the case of Life Insurance Co. v. Fletcher, supra. n that case the policy contained a stipulation "that the rights of the mpany could in no respect be affected by his verbal statements, or y those of its agents, unless the same were reduced to writing and forwarded with his application to the home office." Of this
31 stipulation the court, in that case, said:

"The Company like any other principal could limit the uthority of its agents, and thus bind all parties dealing with them ith knowledge of the limitation. It must be presumed that he read

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the application, and was cognizant of the limitations expressed therein."

And again:

"The present case is very different from Insurance Company v. Williams, 13 Wallace 222, and from Insurance Company v. Mahone, 21 Wallace 152. In neither of these cases was any limitation upon the power of the agent brought to the notice of the insured. * * * Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though normally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application which the assured was required to make and sign and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements."

In the case of The Aetna Life Insurance Co. v. Moore, (decided December 22, 1913), the Supreme Court of the United States
232 said (advance sheets, October term, 1913, No. 33, page 9):

"The medical examiner, as we have seen, put down the answer 'No' to the question asked Salgue as to whether he had heart disease, after being informed by Salgue, that he, Salgue, had been told by physicians that his heart was affected. It appears from the evidence that the other answers of Salgue in his application were written down by the agent of the company; and there is testimony for and against the fact that Salgue informed the agent of the opinion entertained of him by his physicians, and that he also informed the agent of other applications for insurance. It is hence contended that the agent, not Salgue, is responsible for the positive character of the answers and that the insurance company is estopped by this action of the agent and by his knowledge of the actual conditions and circumstances. It is, therefore, further contended that the case comes within the principle of the cases which establish that where the agent of the company prepares the application or makes representations to the assured as to the character and effect of the statements of the application he will be regarded in so doing as the agent of the company, and not the agent of the insured. Among the cases cited to sustain the principle are the following in this court: Union Mutual Life Insurance Co. v. Wilkinson, 13 Wall. 222; American Life Insurance Co. v. Mahone, 21 Wall. 152; New Jersey Mutual Life Insurance Co. v. Baker, 94 U. S. 610; Continental Life Insurance Co. v. Chamberlain, 132 U. S. 304. German-American
233 Life Association v. Farley, supra, is also cited, and, being a Georgia case, its authority is especially urged.

"There are, however, later cases which enforce the provisions of a policy, and we have seen that it was agreed in the policy under review 'that no statement or declaration made to any agent, examiner or other person, and not contained in' the application, should 'be taken or construed as having been made to or brought to the notice of

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knowledge of' the company, 'or as charging it with any liability by reason thereof.' And he, Salgue, expressed his understanding to be that the company or one or more of its executive officers, and no other person, could grant insurance or make any agreement binding upon the company.

"The competency of applicants for insurance to make such agreements, and that they are binding when made, is decided by Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308; Northern Assurance Co. v. Grand View Building Association, 203 U. S. 311; Penman v. St. Paul Fire & Marine Insurance Co., 216 U. S. 311."

So, in the case of the Prudential Insurance Co. v. Moore (decided by the same court the same day; advance sheets, No. 47, October term, 1913, page 5) the Supreme Court said:

"It is contended here as in the Aetna case that the company is estopped by the knowledge of the agent, and the same cases are cited as were cited here. We answer here, as we answered there, that the terms of the policy constituted the contract of the parties, and precluded variation of them by the agent."

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In the case cited, the language of the policy, limiting the authority of the agent, was significantly different from that of the policies in this case. It was "no agent has power in behalf of the company to make or modify this or any contract of insurance, extending the time for paying a premium, to waive any forfeiture or to bind the company by making any promise, or making or receiving any presentation or information." In this case the corresponding stipulation is "agents are not authorized to modify this policy or to extend the time for paying a premium." In the Moore case the agent was debarred from making any contract of insurance in advance of the issue of the policy and from receiving any information so as to bind the company. In this case the only restriction upon the agent is against modifying the policy after it is issued and extending the time for paying a premium.

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In each of these cases, as in the Fletcher case, the Supreme Court held that the terms of the contract prevented the knowledge of the agent from estopping the insurance company, as it would have done in the absence of such a stipulation in the policy. In this, they are to be distinguished from this case. Neither in the application nor in the policies involved in this case is there any similar stipulation limiting the authority of the agent. The only limitation upon the power of the agent contained either in the application or in the policy is this, "agents are not authorized to modify this policy, or to extend the time for paying a premium." The stipulation has no effect until after the contract of insurance has been consummated and the policy issued. It does not purport to limit the power of the agent or examiner in taking the application or the insured's answers or in reporting them to the company. The very provision upon which alone the Supreme Court based its conclusion in the Fletcher and in the Moore cases is absent from the policies in this case, and the court, in those cases, has said

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that in the absence of some such stipulation, the knowledge of the agent or examiner would be that of the company.

The Moore cases also differ from this case in that there was no Georgia statute similar to the Florida statute with reference to agency. The Supreme Court, after analyzing the then existing legislation in Georgia upon the subject of insurance, stated that its only effect to vary the law of insurance was in providing that in no case should an immaterial false statement operate to avoid the policy.

Again, the policies in the Moore cases contained no stipulation that representations, in the absence of fraud, should not be deemed warranties, the effect of which, as construed by the courts, is to avoid the policy only for wilfully and knowingly false representations, though in the absence of such a stipulation, an innocently
237 false but material representation would forfeit the contract.

Our conclusion is that under the language of the policies sued upon, and under the Florida statute heretofore set out, the knowledge of the defendant's agents, Torrey and Hogue, and of its examiners, Kirkpatrick and Turberville, would be binding upon it, unless there was collusion between such agents and the insured to defraud the principal. There was evidence in the record from which the jury might have inferred such collusion and also evidence from which it might have reached the contrary conclusion. The court below instructed the jury fully and properly as to the effect of such collusion, and in view of this fact its refusal to give the instruction requested by the defendant on this point becomes immaterial.

5. Finally, does the record show that the agents and examiners of defendant had knowledge at the time the policies were written of the falsity of the representations relied upon by defendant to
238 avoid the policies? Both Torrey and Hogue knew of the insured's previous application to the Prudential Insurance Company, and of its result. Kirkpatrick also knew of the history of insured's impacted or inverted tooth and of the operation that removed it. Hogue knew that Turberville had made no examination of insured and that Kirkpatrick had made but a partial one. There is evidence from which the jury might have inferred that Hogue deceived the insured and the examiners as to what was required, and that there was no collusion between the insured and himself to falsely report the examination of the doctors. The evidence as to whether the insured had ever had heart disease or indigestion previous to his applying for the policies sued upon is too unsatisfactory to be a sufficient ground for avoiding the policies, even if it were not known to defendant.

It is contended that the knowledge of defendant's agents and examiners was acquired in a different transaction, namely the previous soliciting and examining of the insured for the Prudential
239 Life Insurance Company, and having been so acquired, should not bind the defendant. However, the previous transaction was of recent happening and the knowledge then acquired is shown not to have passed out of the recollection of defendant's agents, but was rehearsed during his examination for the policies sued on and when his application therefor was taken; and, having

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been then within the actual knowledge of the agents, it should be imputed to the defendant, without reference to how or when acquired. If it was then actually known, it was the duty of defendant's agents to have communicated it to defendant, and if the jury found that there was no collusion on their part with the insured, the insurer would be chargeable with knowledge of what its agents then actually knew.

We think the charge of the court fairly presented the law, as we have stated it to be, to the jury, and that the refused instructions, when not consistent with it, were erroneous and properly refused.

Taken in connection with the entire charge, we find no
240 error in the court's reference to Hogue, as defendant's agent, or in the statement that the agents' and examiners' knowledge was imputable to the defendant. The court also told the jury that collusion between the insured and the defendant's agents would prevent this imputation.

We find no error in the record.

Affirmed.

Judgment.

Extract from the Minutes of February 17th, 1914.

No. 2532.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
versus
L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Florida, and was argued by counsel;

241 On consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, The Mutual Life Insurance Company of New York, and the surety on the writ of error bond herein, the United States Fidelity & Guaranty Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

Clerk's Certificate

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages num-

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bered from 212 to 241 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries
242 and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2532, wherein The Mutual Life Insurance Company of New York is plaintiff in error, and L. Hilton-Green and W. A. Finlay, Jr., as executors of the estate of C. L. Wiggins, Deceased, are defendants in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 211 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 18th day of March, A. D. 1914.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

243 In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2532.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
versus
L. HILTON GREEN and W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased, Defendants in Error.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari, I now hereby certify that on the 28th day of May, A. D. 1914, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:—

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In the District Court of the United States for the Northern District of Florida.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Plaintiff in Error,
versus
HILTON GREENE and W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased, Defendants in Error.

The United States Supreme Court having granted the writ of certiorari in the above stated case, directed to the United States Circuit Court of Appeals for the Fifth Circuit, and the record in said case having been filed upon the petition for the writ;

It is hereby stipulated that the record now on file in the Supreme Court of the United States, with the petition for writ of certiorari, be taken as a return to the writ. It is further stipulated that the original exhibits, thirteen in number, now on file in the office of the Clerk of the Circuit Court of Appeals for the Fifth Circuit in said cause, be transmitted to the Clerk of the Supreme Court of the United States to be used upon the hearing in said cause before that Court and be considered a part of the return of the Clerk of the Circuit Court of Appeals, and said Court, to the writ of certiorari, herein granted.

(Signed) EMMETT WILSON AND
PHILIP D. BEALL,
Attorneys for Petitioner.

(Signed) BLOUNT & BLOUNT & CARTER,
Attorneys for Respondents."

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

In accordance with said stipulation, I transmit herewith as part of my return to said Writ of Certiorari, the original exhibits, thirteen (13) in number, filed with the transcript of the record in said cause in this Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 2nd day of June, A. D. 1914.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

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245 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Mutual Life Insurance Company of New York is plaintiff in error, and L. Hilton-Green and W. A. Finlay, Jr., as Executors of the Estate of C. L. Wiggins, deceased, are defendants in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Northern District of Florida, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

246 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixteenth day of May, in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

247 [Endorsed:] File No. 24,162. Supreme Court of the United States, No. 1011, October Term, 1913. The Mutual Life Insurance Company of New York vs. L. Hilton-Green et al. Executors. Writ of Certiorari. 2532. U. S. Circuit Court of Appeals. Filed May 21, 1914. Frank H. Mortimer, Clerk.

248 [Endorsed:] No. 2532. United States Circuit Court of Appeals for the Fifth Circuit. Mutual Life Insurance Company of New York vs. L. Hilton Green and W. A. Finlay, Jr., Executors of estate of C. L. Wiggins, deceased. Writ of Certiorari and Return thereto.

249 [Endorsed:] File No. 24,162. Supreme Court U. S., October term, 1913. Term No. 1011. The Mutual Life Insurance Company of New York, Petitioner, vs. L. Hilton-Greeen et al., Executors. Writ of certiorari and return. Filed June 5, 1914.

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n the Supreme Court of the United States, October Term, 1915.

No. 126.

HE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Petitioners,
vs.
HILTON GREEN and W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased, Respondents.

Stipulation.

It is agreed by and between counsel for the respective parties in ove cause, that the certificate of the Clerk of the District Court the United States, dated the 13th day of October 1915, and the plications and medical examiner's reports thereto attached and rtified, be made a part of the transcript of record in the above cause above court, same having been inadvertently omitted therefrom, d that the Clerk of the Supreme Court of the United States be and is hereby authorized to print this stipulation, the certificate of e Clerk of the District Court of the United States for the Northern istrict of Florida, and the applications and medical examiner's ports thereto attached and therein certified, as a supplement to and nendment of said transcript of record.

This the 21 day of October A. D. 1915.

EMMETT WILSON AND
PHILIP D. BEALL,
Attorneys for Petitioner.
W. A. BLOUNT,
F. B. CARTER,
A. C. BLOUNT,
Attorneys for Respondents.

This application made to the Mutual Life Insurance Company New York is the basis and a part of a proposed contract of in-rance, subject to the charter of the company and the laws of the ate of New York. I hereby agree that all the following statements d answers, and all those that I make to the company's medical aminer, in continuation of this application, are by me warranted be true and are offered to the company as a consideration of the ntract, which I hereby agree to accept, and which shall not take fect unless and until the first premium shall have been paid, uring my continuance in good health, and unless also the policy all have been signed by the president and secretary and counter-gned by the registrar of the company and issued during my con-nuance in good health; unless a binding receipt has been issued hereinafter provided.

I further agree that in any distribution of surplus, the principals d methods which may then be in use by the company for such stribution and its determination of the amount apportioned to ch policy shall be and are hereby ratified and accepted by and

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for every person who shall have or claim any interest in the co
tract.

1. My full name is Cilbey L. Wiggins.

2. I reside at Pine Barren, in the City of Pine Barren, County
Escambia, State of Fla.

3. I do not contemplate going to any foreign country except non

4. My former residences were same.

5. My place of business is Pine Barren, Fla.

6. My P. O. Address is Pine Barren, Fla.

7. My present occupation is president of McMillan Mill/ C
following branch of business or trade lumber mfg.

8. My other occupations are none.

9. My former occupations have been same.

10. The full name of the persons to whom the insurance is pa
able is estate.

11. Residing in ——.

12. The relationship of said beneficiary to me is —.

13. The insurable interest of said beneficiary in the life propos
for insurance, other than that of family relationship is —.

14. Do you wish the privilege of changing the beneficiary fr
time to time provided the policy has not been assigned? Yes.

15. I hereby apply for insurance on my life on the ordina
life payable in twenty installments plan life payments.

16. Amount, $30,648, in four policies of equal amount.

17. The premiums are to be paid annually.

18. I was born on the 5th day of July 1847, in Escambia C
Fla.

19. I am a citizen or subject of U. S. A.

20. I have been accepted for insurance under the followi
policies in this company, none.

21. I am insured in other companies and associations as follo
Prudential, $30,000.00: Equitable, $20,000.00: Fraternal, $5,0
and in no others.

22. I have never made an application for life insurance to a
company or association upon which a policy has not been issued
the plan and premium rate originally applied for, except as to t
following companies or associations: None, and no such applicati
is now pending or awaiting decision.

I hereby warrant and agree that during the period of one y
following the date of issuance of the contract of insurance for wh
application is hereby made, I will not engage in any of the followi
extra hazardous occupations or employments; retailing intoxicati
liquors, handling electric wires and dynamos, blasting, mining, s
marine labor, aeronautic ascensions, the manufacture of high
explosive substances, service upon any railroad train or track
in switching or in coupling cars, or on any steam or other ves
unless written permission is expressly granted by the company.

I also warrant and agree that I will not die by my own act, whet
sane or insane, during the period of one year next following s
date of issue.

I have paid $— in *cahse* to the subscribing soliciting agent, who h

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furnished me with a binding receipt thereof signed by the secretary of the company making the insurance in force from this date, provided this application shall be approved, and the policy duly issued.

Done at Pine Barren, Florida, Dec. 15, 1908.

Signature of person whose life is proposed for insurance.

CILBEY L. WIGGINS.

I have known the above named applicant for six years and saw him sign this application. I have issued binding receipt. No. —.

J. D. TORREY,
Soliciting Agent.

J. D. TORREY,
Manager, Mobile, Ala.

Medical Examiner's Report.

1. (*a*) What is your full name? Cilbey L. Wiggins. (*b*) Age at last birthday? 61.

2. Are you married? Yes.

3. (*a*) What illness, disease or accidents have you had since childhood? (The examiner should satisfy himself that the applicant gives full and careful answer to this question.)

Name of disease: Pneumonia.
Number of attacks: One.
Date of each: 1899.
Duration: 30 —.
Severity: Not severe.
Results: Complete recovery.
Date of complete recovery: —.

3. (*b*) Have you stated in your answer to question 3 (*a*) all such illnesses, diseases or accidents? Yes.

4. State every physician whom you have consulted in the past five years. None. Name of Physician: ——. Address: ——. When consulted: —. Nature of complaint. Give full details above under Q. 3 (*a*) —.

5. Have you ever raised or spat blood? No.

6. (*a*) Are you now in good health? Yes. (*b*) If not, what is the impairment? —.

7. (*a*) Have you a rupture or hernia? (*b*) If so, do you wear a suitable truss? —.

8. Have you undergone any surgical operation? No.

9. Have you lost any part of an arm or leg? No. (*b*) Have you any bodily malformation? No.

10. Have you any impairment of sight or hearing? No.

11. Have you been successfully vaccinated? Yes.

12. (*a*) Have you gained or lost weight in the past year? No. (*b*) If so, how much and from what cause? —.

13. (*a*) Have you ever been under treatment at any asylum, cure, hospital or sanitarium? No. (*b*) If so, when, how long and for what? —.

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14. (*a*) What is your present occupation? Pres't McMillan Mill Co.

(*b*) How long have you been engaged in this occupation? 31 years.

(*c*) What other occupations have you been engaged in? None.

(*d*) Do you contemplate making any change, temporary or permanent, in your occupation? No.

(*e*) Are you engaged in any way in the sale or manufacture of beer, wine, or other intoxicating liquors? No.

(*f*) How long have you been so engaged? Never.

15. (*a*) Have you ever changed your residence on account of your health? No. (*b*) Do you contemplate making any change in your place of residence? No.

16. Have you ever been examined for a policy in any company or association which was not issued as applied for? No.

17. Family record of applicant:

Father—dead: Age 30: specific cause of death, don't know; how long sick, don't know.

Mother:—Living; age, 80; health, good for age.

Brothers:—Number living 1; age 63; health good. Number dead, 1 age, 68; specific cause of death, died during war; dead how long? —.

Applicant has two brothers of which he knows nothing whether living or dead.

Sisters—number living, none. Number dead, none.

Age of Father's father, if living? don't know. If not, age at death. —.

Age of father's mother, if living? Don't know. If not age at death. —.

Age of mother's father, if living? Don't know. If not, age at death. —.

Age of mother's mother, if living? Don't know. If not, age at death. —.

18. Was there any suspicion of tuberculosis or consumption or insanity or cancer as a cause of death among those mentioned above? No.

19. (*a*) Has any member of your household suffered from tuberculosis or consumption during the past year? No.

(*b*) If so, give details. —.

Dated Pine Barren, State of Florida, the 16th day of December, 1908.

I hereby certify that my answers to the foregoing questions are correctly recorded by the medical examiner.

CILBEY L. WIGGINS,
Signature of Person Examined.

Witness:
J. S. TUBERVILLE, M. D.

This application made to the Mutual Life Insurance Company of New York is the basis and a part of a proposed contract of insurance, subject to the charter of the company and the laws of the

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State of New York. I hereby agree that all the statements and answers, and all those that I make to the company's medical examiner, in continuation of this application, are by me warranted to be true and are offered to the company as a consideration of the contract, which I hereby agree to accept, and which shall not take effect unless and until the first premium shall have been paid, during my continuance in good health, and unless also the policy shall have been signed by the president and secretary and countersigned by the registrar of the company and issued during my continuance in good health; unless a binding receipt has been issued as hereinafter provided.

I further agree that in any distribution of surplus, the principals and methods which may then be in use by the company for such distribution and its determination of the amount apportioned to such policy shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest in the contract.

1. My full name is Cilbey L. Wiggins.
2. I reside at ——, in the City of Pine Barren, County of Escambia, State of Fla.
3. I do not contemplate going to any foreign country except none.
4. My former residences were ——.
5. My place of business is Pine Barren, Fla.
6. My P. O. Address is Pine Barren, Fla.
7. My present occupation is president of McMillan Mill/ Co., in the following branch of business or trade lumber mfg.
8. My other occupations are none.
9. My former occupations have been same 31 years.
10. The full name of the persons to whom the insurance is payable is my estate.
11. Residing in ——.
12. The relationship of said beneficiary to me is —.
13. The insurable interest of said beneficiary in the life proposed for insurance, other than that of family relationship is —.
14. Do you wish the privilege of changing the beneficiary from time to time provided the policy has not been assigned? Yes.
15. I hereby apply for insurance on my life on the whole life — twenty installments plan life payments.
16. Amount, $30,548, in four policies of equal amount.
17. The premiums are to be paid annually. Issue in 4 policies of $10,000 each.
18. I was born on the 5th day of July 1847, in Escambia Co., Ala.
19. I am a citizen or subject of U. S.
20. I have been accepted for insurance under the following policies in this company. —.
21. I am insured in other companies and associations as follows: Prudential, $30,000.00; Equitable, $20,000.00; Fraternal, $5,000; and in no others.
22. I have never made an application for life insurance to any company or association upon which a policy has not been issued on the plan and premium rate originally applied for, except as to the

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following companies or associations: — and no such application is now pending or awaiting decision.

I hereby warrant and agree that during the period of one year following the date of issuance of the contract of insurance for which application is hereby made, I will not engage in any of the following extra hazardous occupations or employments; retailing intoxicating liquors, handling electric wires and dynamos, blasting, mining, submarine labor, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad train or track or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the company.

I also warrant and agree that I will not die by my own act, whether sane or insane, during the period of one year next following said date of issue.

I have paid $— in *cahse* to the subscribing soliciting agent, who has furnished me with a binding receipt thereof signed by the secretary of the company making the insurance in force from this date, provided this application shall be approved, and the policy duly issued.

Done at Pine Barren, Florida, Dec. 15, 1908.

Signature of person whose life is proposed for insurance.

CILBEY L. WIGGINS.

I have known the above named applicant for six years and saw him sign this application. I have issued binding receipt No. —.

J. D. TORREY,
Soliciting Agent.

J. D. TORREY,
Manager, Mobile, Ala.

Medical Examiner's Report.

1 (*a*.) What is your full name? Cilbey L. Wiggins. (*b*) Age at last birthday? 61.

2. Are you married? Yes.

3 (*a*) What illness, disease or accidents have you had since childhood? (The examiner should satisfy himself that the applicant gives full and careful answer to this question.)

Name of disease: Pneumonia.
Number of attacks: One.
Date of each: 1899.
Duration: 30 days.
Severity: Not severe.
Results: —.
Date of complete recovery: *Complete recovery.*

3 (*b*) Have you stated in answer to question 3 (*a*) all such illnesses diseases or accidents? Yes.

4. State every physician whom you have consulted in the past five years. Name of physician: None. Address: — ——. When consulted: —.

Nature of complaint. Give full details under Q. 3 (*a*) —.

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5. Have you ever raised or spat blood? No.

6 (*a*) Are you now in good health? Yes (*b*) If not, what is the impairment? —.

7 (*a*) Have you a rupture or hernia? No. (*b*) If so, do you wear a suitable truss? —.

8. Have you undergone any surgical operation? No.

9 (*a*) Have you lost any part of an arm or leg? No. (*b*) Have you any bodily malformation? No.

10. Have you any impairment of sight or hearing? No.

11. Have you been successfully vaccinated? Yes.

12 (*a*) Have you gained or lost weight in the past year? No. (*b*) If so, how much and from what cause? —.

13 (*a*) Have you ever been under treatment at any asylum, cure, hospital, or sanitarium? No. (*b*) If so, when, how long, and for what? —. *Proprietor Lumber Mills.*

14 (*a*) What is your present occupation? Pres't McMillan Mill Co.

(*b*) How long have you been engaged in this occupation? 31 years.

(*c*) What other occupations have you been engaged in? None.

(*d*) Do you contemplate making any change, temporary or permanent, in your occupation? No.

(*e*) Are you now engaged in any way in the sale or manufacture of beer, wine or other intoxicating liquors? No.

(*f*) How long have you been so engaged? Never.

15 (*a*) Have you ever changed your residence on account of your health? No.

(*b*) Do you contemplate making any change in your place of residence? No.

16. Have you ever been examined for a policy in any company or association which was not issued as applied for? No.

17. Family record of applicant:

Father: dead; age 30; specific cause of death, don't know, how long sick, don't know.

Mother: Living. Age 80: Health fairly good.

Brothers: Number living, 1, age 63; health good. Number dead, 1, Age 18, specific cause of death, died in prison during c. war, How long sick —. Applicant has two brothers he does not know if dead or alive.

Sisters: Number living, none. Number dead, none.

Age of Father's father, if living, don't know, if not age at death, don't know.

Age of Father's mother, if living, don't know: If not, age at death? don't know.

Age of Mother's father, if living? Don't know. If not age at death? Don't know.

Age of Mother's Mother, if living? Don't know. If not, age at death? don't know.

18. Was there any suspicion of Tuberculosis, or consumption, or insanity, or cancer as a cause of death among those mentioned above? No.

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19 (*a*) Has any member of your household suffered from Tuberculosis or consumption during the past year? No.
(*b*) If so, give details. —.

Dated at Pine Barren, State of Florida, the 15 day of December, 1908.

I certify that my answers to the foregoing questions are correctly recorded by the Medical Examiner.

CILBEY L. WIGGINS,
Signature of the person examined.

Witness:
GEO. C. KILPATRICK, M. D.

UNITED STATES OF AMERICA,
Northern District of Florida:

I, F. W. Marsh, Clerk of the District Court of the United States within and for the Northern District of Florida, do hereby certify, that the foregoing pages numbered 1 to 10 both inclusive, contain a true and perfect transcript and copy of the applications with medical examiner's reports of Dr. Kilpatrick and Dr. Tuberville, originals of which were introduced in evidence, and copies thereof attached to the pleas of defendant numbered 1 to 20 both inclusive, in the case of L. Hilton Green and W. A. Finlay, Jr., as executors of the estate of C. L. Wiggins, deceased, Plaintiffs, and the Mutual Life Insurance Company of New York, a corporation, defendant, lately pending in said Court; that the originals of said applications and medical examiner's reports introduced in evidence in the testimony of one W. J. Easton, and copies thereof attached to the pleas of the defendant as above set forth, were forwarded by me, as such Clerk, as a part of the original record, to the Clerk of the United States Circuit Court of Appeals, for the fifth circuit, to be filed in a certain case there pending on appeal from the District Court of the United States for the Northern District of Florida, wherein said Mutual Life Insurance Company of New York was plaintiff in error, and L. Hilton Green and W. A. Finlay, Jr. as executors of the estate of C. L. Wiggins, deceased, was defendant in error, same being sent in accordance with order of said District Court dated June 10th 1913.

Witness my hand, and the seal of said Court, at the City of Pensacola, in said District, this the 13th day of October 1915.

[Seal U. S. District Court, Northern Dist. of Florida, Fifth Circuit.]

F. W. MARSH,
Clerk U. S. District Court, Northern District of Florida,
By A. G. CHIPLEY, *D. C.*

[Endorsed:] File No. 24,162. Supreme Court U. S. October term, 1915. Term No. 126. The Mutual Life Insurance Company of New York, Petitioner, vs. L. Hilton-Green et al., as Executors, etc. Stipulation of Counsel and addition to record. Filed October 23, 1915.

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CLERK

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. ~~1011~~ 442 126

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

L. HILTON-GREEN AND W. A. FINLAY, JR., AS EXECUTORS OF THE ESTATE OF C. L. WIGGINS, DECEASED.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

EMMETT WILSON,
P. D. BEALL,
Counsel for the Petitioner.

FREDERICK L. ALLEN,
Of Counsel.

(24,162)

CLOSE IN CENTER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 1011.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

L. HILTON-GREEN AND W. A. FINLAY, JR., AS EXECUTORS OF THE ESTATE OF C. L. WIGGINS, DECEASED.

BRIEF OF EMMETT WILSON AND PHILIP D. BEALL, ATTORNEYS FOR PETITIONER.

This suit was instituted in the Circuit Court of the First Judicial Circuit of Florida in May, 1910; removed by the defendant Insurance Company to the District Court of the United States for the Northern District of Florida; there tried, resulting in a verdict for the plaintiffs; taken by writ of error to the Circuit Court of Appeals for the Fifth Circuit; there reversed; again tried in the district court, resulting in verdict for the plaintiffs; again taken to the Circuit Court of Appeals for the Fifth Circuit, and there affirmed.

It is from this judgment of affirmance that this petition is taken.

The amount involved is the face amount of four policies of insurance, aggregating $30,648, with interest thereon and attorney's fees.

The declaration was in the usual form.

The policy and application, which are made a part of the policy, provide that the statements made by the insured in the absence of fraud shall be deemed representations and not warranties.

The defenses of the Insurance Company were and are based upon answers of the insured, Wiggins, in his application, to the medical examiners, on the theory, 1st, that the statements of Wiggins were warranties, because fraudulently made; 2d, upon the theory that they were misrepresentations.

The particular questions and the answers thereto are more fully set forth in the record, pages 21, 22, and 23, being in substance:

> 1. That he had had no disease, illness, or accident since childhood, except pneumonia of thirty days' duration, and from which he completely recovered—when the evidence will show that Wiggins had suffered several years from indigestion, and been treated therefor, and suffered from a weak and diseased heart, and in 1907 was operated on in a hospital in Montgomery, and went to several places where he found relief, including Hot Springs, Atlanta, and Montgomery (Record, pp. 145, 146, 150, 153, 154, 159).
>
> 2. That he had not consulted a physician in five years last past—when the evidence showed, without contradiction, that he had consulted Dr. Dey, Dr. Thigpen, and had been to Atlanta to consult Dr. Calhoun, and had visited Hot Springs. (See Record referred to in No. 1.)

3. That he was in good health—when as a matter of fact he was not in good health. (See Record, pages above, No. 1.)

4. That he had never undergone a surgical operation—when in fact he had visited Montgomery, was in a hospital for ten days under the treatment of a specialist, and had been operated on for a cyst in the jawbone. (See testimony of Dr. Thigpen, Record, pp. 145-146.)

5. That he had never been in any asylum, cure, hospital, or sanatorium under treatment—when in fact he had been in a hospital in Montgomery and had visited Hot Springs in search of health. (See testimony referred to in No. 1.)

6. That Wiggins made a false certificate or statement to the Insurance Company in this respect, that the company required two medical examinations of an applicant for insurance exceeding thirty thousand dollars, the amount applied for exceeding this amount. Wiggins certified that he had been examined by Dr. Kilpatrick and Dr. Tuberville, and that the questions had been propounded to him by these examiners, and that he had answered them correctly, and that they were correctly recorded by the Wiggins was only partially examined by Dr. Kilsaid examiners—when the undisputed evidence shows that Wiggins was only partially examined by Dr. Kilpatrick, and that he never was examined by Dr. Tuberville.

7. That he had never been examined for a policy in any company or association which was not issued as applied for, and that he had never made application for life insurance which had not been issued on the plan and premium rate originally applied for, and no such application was pending or awaiting decision—when the evidence showed that he had

made application to the Prudential Life Insurance Company of America only a few days before the application to this company, for forty thousand dollars, which was not issued on the plan and premium rate applied for; that such insurance had never issued, and that said application was pending when the application was made to this company.

The replications thereto set forth, in addition to denial that the pleas were true, that the defendant Insurance Company had knowledge of true facts at and before the issuance of the policy.

The contentions, therefore, are in brief that the written photograph and sketch of the life of Cilbey L. Wiggins was the consideration upon which the Insurance Company entered into the contract of insurance.

That, as indicated above, the material portion of same was false, because of the fraud or gross carelessness of the insured in making the answers, and in accepting the policy containing the application and such false answers therein, thus making all statements warranties.

The question involved is necessarily a grave one, of far-reaching importance to the Insurance Company and to companies generally using this form of policy; a large amount is here involved, and enormous amounts contracted for in other policies will be directly involved by said decision.

ARGUMENT.

The policy of insurance issued to the insured was the result of an agreement betwen them, based upon two considerations, viz: the application of insured being made in good faith and truthfully, and the amount to be paid yearly as premiums. There will be no contention, we presume, but that the answers to the questions are for the benefit of the Insurance Company and for its protection.

1st Ground of Petition.

The Court of Appeals, construing section 2765 of Statutes of Florida (1906), held that under this statute the knowledge of the medical examiner and that of the temporary solicitor was the knowledge of the company, evidently basing its opinion upon Continental Life Insurance Company *vs.* Chamberlain, 132 U. S., 304. We may distinguish this case as follows:

1st. The opinion states Boak was the district agent of the Insurance Company under written authority in addition to the statute.

2. The statute there prohibited provisions to the contrary in the policy.

3d. The agent there misled the insured.

The facts in that case were acquired from the insured and not transcribed as given. In this case they were not given by the insured and then falsely set forth by the medical examiners. In addition to this, the insured *certified that the answers given to the questions were correctly recorded by the medical examiners.*

Take the Chamberlain decision, *supra,* where the test of the opinion is based on what the facts would have developed if presented to the home office and under the home office's advice answered, as in that case, to the agent. Here the home office has two certificates by an applicant that he has been examined twice, and that the answers to the questions in the examination are correctly recorded. The insured answered the questions when he signed the certificates and certified them to be true. Can the home office be held to have knowledge of falsity of these answers because the medical examiners, while in another capacity, acquired such knowledge? We think the distinction is apparent.

We contend here that the court erred in not distinguishing between the general agent and special agent of the company, as the evidence shows that Hogue was not a general agent of the company nor an agent at all, merely a middleman seeking to insure Wiggins and merely between Wiggins and the company, and that the knowledge of such a middleman or broker did not bind the company in any manner.

We contend, further, that even though the statute made the solicitor and the medical examiners agents, that a fraud perpetrated by them or any of them when the insured had knowledge of the fraud and certified that the answers were true, and was otherwise so grossly negligent, their knowledge would not bind the Insurance Company, and thereby prevent defenses based on false representations in the application.

a. The evidence shows it was really the agent, if the court should hold that Hogue was agent, working to subserve his own ends, to procure his commission, when he temporarily solicited insurance for the petitioner, and refer to—

American Surety Co. *vs.* Pauly, 170 U. S., 156; 42 Law, 986.

b. That insured Wiggins was cognizant of the statements contained in his applications, or should have been, and refer to—

Dimick *vs.* M. L. I. Co., 69 N. J. L., 384; 55 Atl. Rep., 291.
Insurance Co. *vs.* Houpt, 113 Federal, 576 (text).
Carruthers *vs.* Kansas Mutual, 108 Federal, 492.
Nat'l Fraternity *vs.* Karnes, 60 S. W., 576-579 (text).

2d Ground of Petition.

The court should have found as a matter of law that the inquiries upon which the defenses are based were material.

A. The consultation of physicians was material; whether insured was in good health was material.

Brady *vs.* Company, 60 Federal, 727.
Hubbard *vs.* Company, 100 Fed., 725 (text).
Wilkins *vs.* Company, 7 New York Supp., 589.
Ins. Co. *vs.* Edwards, 159 Federal, 53.
Ins. Co. *vs.* Sladden, 86 Federal, 102.
Carruthers *vs.* Co., 188 Federal, 487.
Company *vs.* Brubraker, 18 L. R. A. (U. S.), 366.

In Horne *vs.* Insurance Company, 64 Barbour, 81, it is held that failure to name a physician consulted is material and in law fraudulent.

B. The surgical operation, and treatment in sanitarium, cure, hospital, or asylum; the application for other insurance.

Each of these were material inquiries, as anything that affects the risk, or the knowledge of which would lead the

company to investigate before issuing a policy, it seems to us, would most certainly be material.

Jeffries *vs.* Company, 22 Wall., 47.
Insurance Co. *vs.* Kelly, 114 Federal, 277 (text).
Webb *vs.* Company, 76 Pacific, 738.
Aloe *vs.* Company, 49 S. W., 553.
McCollum *vs.* Company, 8 N. Y. Supp., 249.
Company *vs.* Mengal, 35 Atlantic, 197.
Company *vs.* Radding, 120 U. S., 183.
Company *vs.* Brubraker, 18 L. R. A. (U. S.), 366.

Regardless of the question of knowledge of the company, the jury should have been instructed as a matter of law that these questions and answers thereto were material.

3d Ground of Motion.

The question of collusion between the agent and the insured was one of law for the court, and the failure in any event to charge that gross carelessness and neglect on the part of the insured by which he made misrepresentations of material matters would be fraudulent.

Insurance Company *vs.* Horne, 64 Barbour, 81.
Insurance Co. *vs.* Fletcher, 117 U. S., 519.
Carrelton Co. *vs.* Am. Cr. Co., 115 Federal, 79.
John Hancock Ins. Co. *vs.* Houpt, 113 Federal, 575 (text).
Fletcher *vs.* Ins. Co., 117 U. S., 519.
1 Cooley's Briefs, 614.
Smith *vs.* Co., 1 L. R. A., 216.
Wierengo *vs.* Company, 57 N. W., 833.

4th Ground of Motion.

This is similar to ground one, being that knowledge acquired in another capacity by the medical examiners and solicitor is not binding upon the company. We refer to the argument on grounds one and five.

5th Ground of Petition.

The policy in this case provides, "All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties." * * *

Our position is that the statements were material as a matter of law, were false by the uncontradicted evidence, and, even though they were representations, each or the combined number were sufficient to avoid the policy.

Contending that if the insured intended to defraud or fraud existed, then all statements became warranties and avoided the policy.

Or, in the *absence of fraud*, being material and false, they avoided the policy.

See

Prudential Ins. Co. *vs.* Moore, 231 U. S., 560; 34 Supreme Ct. Rep., 193-194 (text).
Dimick *vs.* M. L. I. Co., 69 N. J. L., 384.

Further, there is no statutory provision before the court requiring that a representation must be fraudulent in order to avoid policy.

Again, in

Ætna Life Ins. Co. *vs.* Moore, 231 U. S., 543; 34 Supreme Ct. Rep., 190 (text).

The court says that the charge requested by the Insurance Company should have been given, which charge especially states that a material misrepresentation will avoid the

policy, "and that this will be so whether they are or are not willfully or fraudulently made."

Where a breach of warranty is shown in an application, or a misrepresentation is shown, and the evidence is uncontradicted, the case should not be permitted to go to the jury, but the court should direct the verdict for the defendant.

Kelly *vs.* Company, 75 Fed., 637.
Horne *vs.* Co., 64 Barbour, 81.
Brison *vs.* Ins. Co., 115 S. W., 785.
Bryant *vs.* Ins. Co., 60 S. E., 983.
Beard *vs.* Ins. Co., 99 Pac., 831.
Company *vs.* Hayslett, 68 S. E., 256.
111 Cooley's Briefs, 1978-9.

We submit the opinion in this respect is erroneous.

6th Ground of Petition.

The Insurance Company is there held to be estopped from controverting the truthfulness of the answers of the insured because they in other capacities acquired knowledge of the falsity thereof, and their knowledge is held to be the knowledge of the company.

We submit, first, the agent and temporary examiners had no authority to commit a fraud upon the company, and, when an agent goes beyond the scope of his authority and participates and assists in making a contract with his principal which is a fraud upon his principal, the principal is not bound.

Union Central L. I. Co. *vs.* Robinson, 148 Fed., 358; 78 C. C. A., 268.
Mattson *vs.* Samaritan, 98 N. W., 330.
Ward *vs.* Ins. Co., 33 Atl., 902.
Ins. Co. *vs.* Wolfe, 95 U. S., 326 (special text, 331).
Co. *vs.* Harris, 57 S. W., 635.
Co. *vs.* Graig, 111 Pac., 325.

Co. *vs.* Bld. Ass'n, 133 U. S., 308.
Co. *vs.* Mullen, 69 Atl., 385.
Foote *vs.* Co., 61 N. Y., 571.
Wilkins *vs.* Co., 77 N. Y. Supp., 589.
Clemens *vs.* Co., 16 L. R. A., 33.
Co. *vs.* Fletcher, 117 U. S., 519.
American Surety Co. *vs.* Pauly, 170 U. S., text, 156-157; 42 Law Ed., 986.

Particularly so where the insured is cognizant of the fraud and fails to object to same; for, when the insured is cognizant of the fraud and the company is not, can the fraud be due to the company's fault or that of the insured? Good faith would require that he notify the company of the fraud.

Dimick *vs.* M. L. I. Co., 69 N. J. L., 384; 55 Atl., 291.
B. E. I. Co. *vs.* G. Ry. Co. (1869), L. J., Vol. 38, p. 314 (N. S.).
Gallant *vs.* M. L. I. Co., 167 Mass., 79.
Lewis *vs.* Phœnix Ins. Co., 39 Conn., 100.
Ryan *vs.* Company, 41 Conn., 160.
Fletcher *vs.* Co., 117 U. S., 519.
Ketcham *vs.* American Co., 117 Mich., 521; 76 Md., 5.
Bostwick *vs.* Mutual Co., 67 L. R. A., 705.
Murphy *vs.* Royal Co., 27 Southern, 149.
Dight *vs.* Chapman, 5 L. R. A., 743.
U. S. Co. *vs.* Charleston, 183 Federal, 243 (text).

It is not the intent or purpose of the Florida statute to estop an insurance company from pleading, proving and successfully defending against a fraud committed by a dishonest applicant with the aid and assistance of dishonest agents and medical examiners.

An applicant for insurance who knowingly assists in the preparation of an application which is the inducing cause for the issuance of a policy of insurance by an insurance company located at a great distance from the applicant's residence and compelled in the nature of things to rely upon written applications, cannot successfully invoke the doctrine of estoppel when the fraud is discovered and an attempt is made to take the fruits of the fraud.

"Estoppel," or "waiver," is founded upon principles of justice and equity and is never applied by a court to secure a party to a fraud against the consequences of his fraud.

Respectfully submitted,

EMMETT WILSON AND
PHILIP D. BEALL,
Counsel for the Petitioner.

FREDERICK L. ALLEN,
Of Counsel.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. [illegible]. 126

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

L. HILTON-GREEN AND W. A. FINLAY, JR., AS EXECUTORS OF THE ESTATE OF C. L. WIGGINS, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

EMMETT WILSON,
P. D. BEALL,
Counsel for the Petitioner.

(24,162)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 1011

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

L. HILTON-GREEN AND W. A. FINLAY, JR., AS EXECUTORS OF THE ESTATE OF C. L. WIGGINS, DECEASED.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The petition of the Mutual Life Insurance Company of New York, plaintiff in error in the Circuit Court of Appeals of the United States for the Fifth Judicial Circuit of the United States, respectfully shows to this honorable court that L. Hilton-Green and W. A. Finlay, Jr., as executors of the estate of C. L. Wiggins, deceased, on the 29th day of May, A. D. 1910, filed in the Circuit Court of Escambia County, First Judicial Circuit of the State of Florida, præcipe in an action at law for damages in the sum of $60,000 against the Mutual Life Insurance Company of New York, petitioner herein, and on the 6th day of June, A. D. 1910, filed

a declaration in said court in said cause, basing their cause of action on four policies of insurance, being numbers 1,765,206, 1,765,204, 1,765,210, and 1,765,208, each for the sum of $7,662.00, upon the life of one Cilbey L. Wiggins, deceased, praying the recovery of said amounts and a reasonable attorney's fee in accordance with statutes of Florida. That on the 28th day of June, A. D. 1910, petitioner filed in said Circuit Court of Escambia County, First Judicial Circuit of Florida, petition for removal and bond for removal therewith, said petition setting forth diversity of citizenship and that the amount in controversy exceeded the sum of $2,000.00, exclusive of interest and costs. Thereupon the judge of said Circuit Court of Escambia County, First Judicial Circuit of Florida, entered an order removing said cause to the Circuit Court of the United States for the Northern District of Florida. Thereupon, on the 4th day of July, A. D. 1910, petitioner filed in the said Circuit Court of the United States certified transcript of proceedings in the said Circuit Court of Escambia County, Florida; that thereafter, on the 1st day of December, A. D. 1911, plaintiffs filed amendments to declaration, and on the 11th day of January, A. D. 1912, petitioner filed its pleas to said declaration. On the 27th day of May, A. D. 1912, plaintiffs filed their replications to said pleas, and on the 13th day of June, A. D. 1912, petitioner filed joinders thereon.

That said cause was heard and determined before a jury of twelve men on the 6th day of June, A. D. 1913, in the Circuit Court of the United States for the Northern District of Florida, at Pensacola, the verdict of the jury being for the sum of $30,648.00, with interest at rate of 8 per cent from suit and 12½ per cent attorney's fees on the principal sum and interest, and judgment was entered thereon.

That thereafter, to wit, on the 10th day of July, A. D. 1913, a writ of error was allowed and perfected. On the 23d day of July, A. D. 1913, a transcript of all proceedings was filed in the United States Circuit Court of Appeals for

the Fifth Circuit, sitting at New Orleans, in the State of Louisiana, and said cause was entered and docketed in said Court of Appeals, entitled The Mutual Life Insurance Company of New York, plaintiff in error, *versus* L. Hilton-Green and W. A. Finlay, Jr., as executors of the estate of Clibey L. Wiggins, deceased, defendants in error, and numbered 2532 on said docket.

That the assignment of errors filed in said cause was as follows (omitting caption):

Now comes the defendant and files the following assignments of error, which it will rely upon in the prosecution of the writ of error in this cause:

1. The court erred in charging the jury in the oral charge in the following language:

> "If Wiggins knew they were false, and that he had made them with the fraudulent purpose of obtaining the policy of insurance, then such statements would avoid the policy and would serve as a good defense by the company; Provided, that the company at the time it accepted the application of the deceased as an insurance risk had no knowledge of the falsity of the statements and representations made by Wiggins in his application for insurance."

2. The court erred in charging the jury in the oral charge in the following language:

> "The law with regard to contracts of life insurance is, that the applicant, when required to state his condition, the condition of his health past and present, must state the facts as to material inquiries truthfully and honestly. A material inquiry would be one concerning the truth of which *to* (it) would be important for the company to know, and one likely to influence its action on the application for insurance and if the applicant answers a material question untruthfully, with a fraudulent purpose, that is, with intent to deceive the insurance company, such untruthful statement would avoid the policy.
>
> "Under the terms of the policy in this action, it is

stipulated that all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties. Therefore, in the absence of fraud, no statement made by Wiggins in the application, though untrue, to any material matter, would avoid the policy, and no false statement made by him which was not material to the inquiry, that is, which did not induce the company to issue the policy, or one which Wiggins did answer with fraudulent intent to procure the policy, can be relied on by the company as a defense to this action."

3. The court erred in charging the jury in the oral charge in the following language:

"But to avoid the policies on these grounds, you must find from the evidence that Wiggins made the false representations charged, and that he made them fraudulently; that they were material, and that there were in fact, illnesses, diseases, of the heart, indigestion and a surgical operation, and that he had consulted physicians, and had certified that he had been examined by Dr. Tuberville."

4. The court erred in charging the jury in the oral charge in the following language:

"The contract of insurance in this case, as expressed by the policies, embraces the statements and representations of Wiggins, the deceased, made to the agent, Hogue, or to Kilpatrick, or Tuberville, the medical examiners."

5. The court erred in charging the jury in the oral charge in the following language:

"If you find from the evidence that the statements of Wiggins in the several matters inquired about his health and operation and treatment in a sanitarium were false, and further find that the agents, Hogue, and Torrey, and Tuberville, knew they were false, and * * *."

6. The court erred in charging the jury in the oral charge in the following language:

> "In determining whether the defendant knew the facts stated in the last given instruction, it is not necessary that you should find that any of the chief officers of the defendant so knew. It is only necessary that you should find an agent whose knowledge would by the knowledge of the defendant company, did so know."

7. The court erred in charging the jury in the oral charge in the following language:

> "Then, the representations made by Wiggins in his application for insurance had been rejected; or whether he had been treated in a cure, sanitarium or hospital; or whether he had undergone a surgical operation; or whether he had had any illness or disease; or whether he had consulted a physician for his health, to serve as a defense by the company to this action, depends upon whether such statements were knowingly false and fraudulently made."

8. The court erred in charging the jury in the oral charge in the following language:

> "If you find that Tuberville knew that he had not made an examination of Wiggins, or propounded any questions to him, and that Wiggins had misstated the facts when he certified that his answers were correctly recorded by the medical examiner, then if you find from the evidence that Tuberville was such agent of the defendant company as to bind it by his, Tuberville's knowledge, and that the defendant knew of such false certificate, in that case the defense of the defendant, based upon the said alleged false representation, cannot be sustained. But if Wiggins knowingly signed the certificate in blank, which purported to contain the answers to the medical examination by Dr. Tuberville and before his answers had been inserted therein, it was a material representation and binding on him, and if false would avoid the policy, unless the company through its medical examiner, Tuberville, had knowledge that the certificate was

false, if it was signed by Wiggins in blank in collusion or under an express or tacit understanding with Tuberville that Wiggins was not to make the answers, then it would be such a false representation as to avoid the policy."

9. The court erred in refusing to give the following instruction requested by the defendant:

"The defendant moves the court to direct a verdict in its favor because:

"1. The evidence shows without contradiction that Wiggins made false statement in the application for insurance, relative to the fact of the consultation of physicians during the five years preceding the application.

"2. Because the evidence shows without contradiction that Wiggins untruthfully stated in his application that he had not consulted a physician within five years next preceding the date upon which the application was made.

"3. Because the evidence shows without contradiction that Wiggins untruthfully made the statement that he had not applied for insurance in any other company, which insurance had not been issued upon the plan and premium rate proposed.

"4. Because it is shown without contradiction that Wiggins stated that he had never made application for insurance which had not been issued as applied for, and that no such application for insurance was then pending undisposed —.

"5. Because the evidence shows without contradiction that Wiggins reported falsely to the defendant that he had had no disease or accident since childhood except pneumonia, from which he had recovered.

"6. Because the evidence shows without contradiction that Wiggins stated in his application for insurance sued upon that he had not been in any asylum, cure, or hospital, when in truth he had within several months before the date of the making of said application been an inmate of a sanitarium and had been operated upon in a sanitarium.

"7. Because the evidence shows that Wiggins stated to the defendant in said application that he

was in good health, when in fact it is shown that he was not in good health at the time of making said application.

"8. Because the evidence shows without contradiction that Wiggins reported and certified to the defendant that he had been examined by Dr. Kilpatrick and Dr. Tuberville, upon this application for insurance, when in fact it is shown that Dr. Kilpatrick made only a partial examination and that Dr. Tuberville made no examination whatever."

10. The court erred in refusing to give the following instruction requested by the defendant:

"The evidence in this case shows that the agent Hogue, who wrote the application and solicited the insurance which was issued to Wiggins, was not a regular or general agent of the Mutual Life Insurance Company, but was only an insurance broker; hence, the court instructs you that Hogue's knowledge of the falsity of the representations, if any, made by Wiggins, is not chargeable to the defendant company, and it is not bound by such knowledge on the part of Hogue."

11. The court erred in refusing to give the following instruction requested by the defendant:

"The court instructs you that if you find from the evidence that the agent and medical examiners of the defendant company knew of the false representations, if any, made by Wiggins, and that they colluded with Wiggins to procure this insurance, then such 'knowledge' on their part is not chargeable to the defendant company, and it is not bound thereby."

12. The court erred in refusing to give the following instruction requested by the defendant:

"The court instructs you that if you find from the evidence that the agent and medical examiners who acted for the company in this instance knew of the falsity, if any, of the answers and representations made by Wiggins, and purposely failed to notify the

company of such falsity of said answers, and representations, then they become the agents of Wiggins in the perpetration of this wrong, and the defendant company is not bound by their knowledge."

13. The court erred in refusing to instruct the jury as requested by the defendant in the following requested charge:

"The court instructs you that the agents and medical examiners of the defendant company may have known at the time the application was made that Wiggins had been in ill health and was in ill health at the time of making *of* said application, but that such knowledge of such agent and medical examiners was not binding on the defendant insurance company unless it is further shown by the evidence that said agent or medical examiners, or one of them, notified the company at its home office or through a general agent, and such knowledge of said agent or medical examiners is not chargeable to the company unless it was so imparted to the company."

14. The court erred in refusing to give the following instruction requested by the defendant:

"The court instructs you that although the agent and medical examiners of the Mutual Life Insurance Company may have known at the time *of* the application was made, that said Wiggins had consulted physicians, within five years next preceding the making of said application, that such knowledge of such agent or medical examiners does not bind the defendant insurance company unless it is further shown that said agent or medical examiners notified the defendant company at its home office, or otherwise, in such manner that it reached the officers at the home office, and such knowledge of said agent or medical examiners is not chargeable to the company unless information thereof was so imparted to the company."

15. The court erred in refusing to give the following instruction requested by the defendant:

"The court instructs you that if you believe from the evidence that Wiggins understood that two medi-

cal examinations were required by rule of the company, and that he certified to two examinations by separate physicians and that the answers he made to each were correctly recorded, and you find further from the evidence that such certificates or statement by said Wiggins *was* untrue, and in fact that he had not been examined by two separate physicians, you will find for the defendant."

16. The court erred in refusing to give the following instruction requested by the defendant:

"The court instructs you that if you believe from the evidence that Wiggins certified to the defendant company that he had been examined by Dr. George C. Kilpatrick and that the said Kilpatrick had correctly recorded the answers, and that he had been examined by Dr. J. S. Tuberville, and that said *Sr* (Dr.) Tuberville had correctly recorded his answers, and you find further that either one or both, of said doctors did not make such examination, you will find for the defendant."

17. The court erred in refusing to give the following instruction requested by the defendant:

"The court instructs you that the inquiry of the defendant contained in the application which Wiggins signed, with reference to the consultation of physicians, was a material inquiry, and that if Wiggins falsely answered said inquiry the policy is avoided and your verdict should be in favor of the defendant."

18. The court erred in refusing to give the following instructions requested by the defendant:

"The court instructs you that the inquiry contained in the application and signed by Wiggins, asking him if he was in good health, was a material inquiry, and if he answered said inquiry untruthfully the policies sued upon are thereby avoided, and you should find for the defendant."

19. The court erred in refusing to give the following instruction requested by the defendant:

> "The court instructs you that the inquiry contained in the application for the insurance sued upon, asking Wiggins if he had undergone any surgical operation, was a material inquiry, and if he answered said inquiry falsely the policies sued upon are avoided and of no effect, *and of no effect,* and you should find for the defendant."

20. The court erred in refusing to give the following instructions requested by the defendant:

> "The court instructs you that the inquiry contained in the application for insurance herein sued upon, asking Wiggins, if he had ever been under treatment in any asylum, cure, hospital, or sanitarium, was a material inquiry affecting the risk, and if Wiggins answered same falsely the policies sued upon are avoided and of no effect, and you should find for the defendant."

21. The court erred in refusing to give the following instructions requested by the defendant:

> "The court instructs you that the inquiry in the application, for this insurance, asking Wiggins if he had ever been examined for a policy in any other company or association which was not issued as applied for, was a material inquiry affecting the risk, and if Wiggins answered same falsely the policies are avoided and of no effect, and you should find for the defendant."

22. The court erred in refusing to give the following instruction requested by the defendant:

> "The court instructs you that if you find from the evidence that Wiggins answered falsely a material inquiry contained in the application for this insurance or made a false statement of a material matter, and you find further that he made such false answers or statements carelessly or negligently, you must find that he thereby committed a fraud on the insurance

company, and the policies issued under the application are thereby avoided and of no effect: In other words, if you find that Wiggins was grossly careless and negligent, in that he misrepresented material matters to the company, in law such conduct will be considered fraudulent and the policies sued on in this case are thereby avoided as above stated."

23. The court erred in refusing to give the following instructions requested by the defendant:

"The court instructs you that the medical examination attached to the application is a part of the application, and that the whole application in this case became a part of the contract of insurance and was incorporated in the several policies sued upon. Therefore, you are instructed that if Wiggins received the said policies and retained the same, he is presumed to have been familiar with the terms of said policies including the statements and answers contained in the application. And further if you find from the evidence that he did receive said policies and retained the same, and that the application incorporated in said policies contained false answers or statements relative to material matters affecting the risk, then Wiggins is presumed to have ratified the statements and answers which were written in said application, whether they were truthful or untruthful, and if you find that they were false to material matters the plaintiffs cannot recover in this case and your verdict must be in favor of the defendant."

This the 10th day of June, A. D. 1913.

EMMETT WILSON &
PHILIP D. BEALL,
Attorneys for Defendants.

(Endorsements omitted.)

That afterwards, to wit, on the 5th day of January, A. D. 1914, said cause came on to be heard in the Circuit Court of Appeals before Hon. Don A. Pardee, Hon. David D. Shelby, and Hon. W. I. Grubb, and on the 17th day of February,

A. D. 1914, judgment of affirmance of judgment of the Circuit Court of the Northern District of Florida (second trial being had in District Court because of change of same by Judicial Code) by said Circuit Court of Appeals for the Fifth Circuit.

Your petitioner is advised that said judgment of the Circuit Court of Appeals is final and is erroneous and that this honorable court should require the case to be certified to it for its review and determination under the act of Congress permitting causes made final in the Circuit Court of Appeals to be certified here for revision.

That said decision and opinion of the Circuit Court of Appeals aforesaid involves the construction of section 2765, General Statutes of the State of Florida, as follows:

> "SEC. 2765 (2224). Agents. Any person or firm in this State, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as such agent or representative of such company, association, firm, or individual, or who in anywise, directly or indirectly, makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

A statute similar to that of many of the other States of the United States, and upon the construction thereof great sums of money and many contracts of insurance and much litigation will depend.

That the construction placed upon such statute by said Circuit Court of Appeals was not following any decision of the Supreme Court of the State of Florida, because no con-

struction thereof had been had by said Supreme Court of Florida.

That said construction of the Circuit Court of Appeals in substance and effect held that any of the parties mentioned in said statute when embraced within its terms was thereby created a general agent of the Insurance Company, and that as such could bind the Insurance Company by his acts, doings, and knowledge, and that his knowledge was thereby imputed to the Insurance Company; and this despite the fact that the policy, of which the *application* and medical *examiner's report* were a part, provided *"agents are not authorized to modify this policy or to extend the time for paying the premium."*

2. That the question of the materiality of the answers of the defendant were questions of fact for the jury, and not questions of law for the court, the evidence being uncontradicted as to their existence.

3. That the question of collusion between the agent and the deceased was one for the jury, ignoring the question of acceptance by Wiggins, the deceased, of the policy, a part of which contained answers which were false, as constituting such negligent conduct on the part of Wiggins as to impute fraud to him in adopting such answers as a part of the contract.

4. That the knowledge of the solicitors and physicians of the company—as the evidence showed conclusively and without contradiction, had been in the employ of the company but for the transaction resulting in the policies sued on in this case, acquired in other capacities, and in the employ of another company, because of the terms of the contract of insurance and the statute of Florida above set forth—was the knowledge of the company, and the company was estopped from urging such false statements as defenses because thereof.

5. In following the opinion of the Fourth Circuit Court of Appeals in case of Ætna Life Insurance Company *vs.* Outlaw, 194 Federal Reporter, 862.

6. That the company was estopped from setting up the falsity of answers of the deceased Wiggins, stating he had been examined by two physicians, which the uncontradicted evidence showed to be false, because of the knowledge of the medical examiners and solicitor, said knowledge having been obtained not in the discharge of any duty to the company or in furtherance of its business.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued under the seal of the court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, La., commanding the court to certify and send to this court on a day to be designated a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this honorable court as provided by the act of Congress approved March 3, 1891, and as amended by section 240, Judicial Code; and that the said judgment of the Circuit Court of Appeals be reversed by this honorable court, and for such other and further relief as may seem proper.

And your petitioner will ever pray.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
By EMMETT WILSON &
P. D. BEALL,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
District of Columbia:

Before the undersigned authority personally came Emmett Wilson, who being duly sworn, on oath deposes and says that he is of counsel for the petitioner in the above matter; that he knows of the above proceedings had that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

EMMETT WILSON.

Subscribed and sworn to before me this the 11th day of April, A. D. 1914.

[Seal James D. Maher, Notary Public, District of Columbia.]

JAMES D. MAHER,
Notary Public, District of Columbia.

[Endorsed:] Supreme Court of the United States. Mutual Life Insurance Co. of New York. Petitioner. Petition for certiorari. Emmett Wilson & Philip D. Beall for Petitioner.

Office Supreme Court, U. S.
FILED
MAY 2 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 126

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
PETITIONER,
vs.
L. HILTON GREEN and W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased.

BRIEF IN OPPOSITION

To the petition of The Mutual Life Insurance Company of New York, for a writ of certiorari to review the decision of the Circuit Court of Appeals of the Fifth Circuit.

William A. Blount, A. C. Blount and F. B. Carter, Attorneys for L. Hilton Green and W. A. Finlay, Jr., Executors of C. L. Wiggins, deceased, respondents to the petition.

The White Printing Co., Pensacola.



Supreme Court of the United States,

OCTOBER TERM, 1913,

No. 1011.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

PETITIONER,

vs.

L. HILTON GREEN and W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased.

BRIEF IN OPPOSITION

To the petition of The Mutual Life Insurance Company of New York, for a writ of certiorari to review the decision of the Circuit Court of Appeals of the Fifth Circuit.

William A. Blount, A. C. Blount and F. B. Carter, Attorneys for L. Hilton Green and W. A. Finlay, Jr., Executors of C. L. Wiggins, deceased, respondents to the petition.

The grounds upon which the writ is asked are to be found in pages 12 to 14, inclusive, of petition. We apprehend that this Court will not go outside of these grounds.

We also apprehend that the Court will not grant the writ, unless it appears from these grounds:

1. That the questions involved are of serious importance and gravity to the nation, to the public at large, or to

uniformity in the administration of justice; and that (except when the decision of this Court is desired for the sake of uniformity,)

2. The decision of the Court below was probably wrong.

1. The petitioner brings this case within none of the classes of cases which this Court regards as of sufficient importance to cause it to desire to review the action of the lower Court.

In fact, the petition only asserts one consideration as of such general importance as to justify the writ; that is, that "A Statute (of Florida is) similar to that of many of the other States, and upon the construction thereof great sums of money and many contracts of insurance and much litigation will depend."

It will be noticed that the brief of petitioner does not touch this assertion at all, but plants itself, as to the gravity of the question, upon an entirely different ground; that is, "The question involved is necessarily a grave one, of far reaching importance *to the Insurance Company*, and to Companies generally using this form of policy. A large amount is *here* involved, and enormous amounts contracted for in other policies will be directly involved by said decision." This follows a statement as to terms of the policies in suit, purporting to define whether certain statements were representations or warranties.

It thus appears that the petition relies upon the importance of a proper construction of the Statute of the State of Florida, while the brief ignores this and relies upon a proper construction of the policy. If the petitioner is uncertain as to what may be the matter of importance requiring adjudication, this Court will not hunt for it.

But the serious importance and gravity of neither ground is made apparent.

As to the construction of the Statute of Florida:

The importance of a proper construction is made to defend upon the *assertion* that the Statute of Florida is similar to that of many of the other States of the United States. This is mere assertion, however, and it is not made to appear, either in the brief, or in the petition, that there are any other Statutes of other States dealing with the relations of persons effecting insurance with the Insurance Companies in which such insurance is effected, nor that such other Statutes are *similar* to the Florida Statutes.

Nor does it appear, except by way of *assertion*, that "upon the construction thereof great sums of money and many contracts of insurance and much litigation will depend."

This Court cannot take judicial notice of the facts stated,—it does not necessarily arise from the existence of such a Statute, and there is no other attempt to demonstrate them to the Court.

Moreover, the importance of reviewing and overruling the decision of the Court below is only to the petitioner, and, at the most, to it and other Insurance Companies. The public is not interested, for the decision below is in favor of the public,—a large number of persons contracting with Insurance Companies, whose interests, of course, are forwarded by the extension of the scope of the powers of Agents of insurance companies.

As to the construction of the Policy.

The petition says nothing as to this. The brief alone mentions it, and that falls far short of showing a question of serious importance and gravity.

The question is alleged to be "of far reaching importance to the Insurance Company;" that is, to the petitioner. "And to Companies generally using this form of policy." There is no assertion, and no showing, however, that other Companies do use this form of policy, or that they generally

use them. So far as any direct allegation is concerned, this petitioner may be the only Company using a like form of policy, and even as to it, this form may be only one of the many classes issued by it, and this class may be a very small one.

Of course, the allegation that "a large amount is here involved" (in fact, less than Fifty Thousand ($50,000.00) Dollars,) can have no influence in determining this Court to review the decision below.

The only other allegation is that "enormous amounts contracted for in other policies will be directly involved by said decision." Of course, the fact that the amounts are large will not justify the granting of the petition, especially as it does not appear that anyone else is interested in such amounts, except the petitioner, since the petition fails to negative the idea that such amounts are involved only upon its own policies.

But a complete answer to the whole insistence is that the Court is not asked to pronounce upon or fix a principle of general law, but *merely to construe a contract,* the terms of which are entirely within the control of the petitioner, who can avoid the effect of the alleged wrongful construction of it by discontinuing the use of such a form, and substituting therefor contracts which are so framed as not to be subject to this construction.

And, as we have heretofore said, this question is only important to Insurance Companies, and not to the public in whose favor the decision below was.

2.

We assume that though the Court below was right in its opinion upon a matter of general importance, this Court might grant a writ of certiorari, if the decisions of other Courts of the United States were in conflict, and it were desirable to settle the conflict, and render certain the law; but we also assume that except in such cases of conflict, it

must appear to this Court that in addition to the matter being of general public importance, the Court below was probably wrong.

In this case, however, there was no conflict of opinion between the lower United States Courts, nor between them and any State Courts.

Upon the effect to be given to the Statute of the State of Florida, as defining the extent of the representation of Agents of Insurance Company principals, there are two decisions of the lower Courts:

New York Life Insurance Co. vs. Russell, 77 Fed., 94-100-106,

decided by the Circuit Court of Appeals, Eighth Circuit; and,

The decision in the instant case,

decided by the Circuit Court of Appeals, Fifth Circuit.

Upon the construction of the policy, as to the effect of statements by the assured, we have found but one Federal decision.

Aetna Life Insurance Co. vs. Outlaw, 194 Fed., 862, decided by the Circuit Court of Appeals, Fourth Circuit.

Which is reinforced, however, by

Pelican vs. Mutual Life Insurance Co., 44 Montana, 277; 119 Pac., 778.

There is thus no conflict in the decisions of the lower Courts, to be harmonized by this Court.

If, then, the questions were of such a class as to justify this Court in taking cognizance of them, is the decision of the Court below so apparently wrong as to require this Court to set it right? We assume that this Court will not issue a writ of certiorari in every case where important public questions have been decided by a Circuit Court of Appeals, but only where this Court, from a cursory inspection of the record, has reason to apprehend that the question was wrongly decided below, and thinks that justice requires a further investigation here.

We submit that not only is the decision below not apparently wrong, but is obviously right

The construction of the Statute was right.

See the decisions cited above, to-wit:

New York Life Insurance Co., vs. Russell, 77 Fed., 94-100-106.

The decision below in the instant case.

And such construction was in accord with the decision of this Court, construing a similar Statute.

Continental Life Insurance Co., vs. Chamberlain, 132 U. S., 304-310, et seq.

And in accord with the law, in the absence of the Statute:

As to the solicitor's knowledge as Agent:

3 Cooley's Briefs, etc., pages 2529h., et seq.

And

As to the knowledge of the medical examiners:

Hoeland vs. W. U. L. I. Company, 58 Wash., 100; 107 Pac., 866.

K. of P. vs. Cogbill, 99 Tenn., 28; 41 S. W., 340.

We do not discuss the allegations of error, one, two, three, four, five and six, set forth in the petition, (pages 12, 13, 14), for they raise no questions other than those of general law, not necessary or appropriate for this Court to consider in this proceeding. If the Court, however, desires to consider them, we call attention to the well reasoned and comprehensive opinion of the Court below in this case.

Respectfully submitted,

W. A. BLOUNT,
F. B. CARTER, and
A. C. BLOUNT,
Attorneys for Opposition to the Petition.

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Supreme Court of the United States,

OCTOBER TERM, 1915.
No. 126.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Petitioner

vs.

L. HILTON-GREEN and W. A. FINLAY, Jr., as Executors of the estate of C. L. Wiggins, deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief of the Petitioner, The Mutual Life Insurance Company of New York.

FREDERICK L. ALLEN,
EMMETT WILSON,
PHILIP D. BEALL,
MURRAY DOWNS,
Of Counsel.

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IN THE

Supreme Court of the United States,

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Petitioner, *vs.* L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of the Estate of C. L. WIGGINS, Deceased.	October Term, 1915. No. 126.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS AND BRIEF ON BEHALF OF THE PETITIONER, THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Case Stated.

This case is pending in this court pursuant to a writ of certiorari, granted at the October Term, 1913, addressed to the Circuit Court of Appeals for the Fifth Judicial Circuit.

The suit was instituted in the Escambia County Circuit Court of Florida in May, 1910; removed by the petitioner, The Mutual Life Insurance Com-

pany of New York (which will be referred to, as the Insurance Company), the defendant, in the court below, to the Circuit Court of the United States for the Northern District of Florida, the jurisdiction of which court was based upon the diverse citizenship of the parties; there tried, resulting in a verdict for the plaintiffs; taken by writ of error to the Circuit Court of Appeals for the Fifth Judicial Circuit; there reversed (202 Fed. 113; 120 C. C. A. 267); again tried in the District Court, resulting in a verdict for the plaintiffs; again taken to the Circuit Court of Appeals for the Fifth Judicial Circuit, and there affirmed (211 Fed. 31; 127 C. C. A. 467).

The action is brought to recover upon four policies of life insurance Nos. 1765204-6-8-10 issued by the Insurance Company upon the life of one Cilbey L. Wiggins of Pine Barren, Florida, each for the face amount of seven thousand six hundred and sixty-two dollars ($7,662).

The policies are printed in full at pages eight, eighteen, twenty-eight and thirty-eight of the record.

The applications upon which the said policies were issued are printed in full at page one hundred seventy-one to one hundred seventy-eight of the record. The original applications in full will be handed to the Court on the argument.

The Pleadings.

The declaration (Rec., p. 4) is in the short form and sets forth briefly that on or about December 16, 1908, the petitioner, Insurance Company, issued to the said Cilbey L. Wiggins four policies

of insurance (copies of which were attached to the declaration and marked Exhibits A, B, C and D) for the sum of seven thousand six hundred and sixty-two dollars ($7,662) each; that the said Cilbey L. Wiggins died on the 26th day of March, 1910; that the said Cilbey L. Wiggins left a will in which L. Hilton-Green and W. A. Finlay, Jr., (the respondents) were named as executors and that said will was duly admitted to probate by the Surrogate's Court of Escambia County, Florida, and that letters testamentary issued to said respondents, the plaintiffs in the court below, who duly qualified and are acting as such executors; that during his life time Wiggins had duly performed all conditions of said policy contracts on his part to be performed; that the plaintiffs filed with the petitioner, Insurance Company, due proofs of the death of the said Cilbey L. Wiggins; that the plaintiffs made demand on the petitioner for the payment of said policies which demand was refused.

December 1, 1911, the respondents amended their declaration by striking from the Exhibit attached to the declaration the paper marked "Application"; by striking from the said exhibit the paper marked "Medical Examiner's Report" and in two other particulars which are not material (Rec. p. 54).

January 11, 1912, the petitioner, Insurance Company, filed twenty separate pleas (Rec. pp. 54-78).

Concisely stated, the pleas present the following defenses:

1. That the policies in question were issued upon an application partly printed and partly

written, made by Cilbey L. Wiggins to The Mutual Life Insurance Company of New York; that the said application stated, among other things:

> "I hereby agree that all the following statements and answers, and all those that I make to the Company's Medical Examiner, in continuation of this application, are by me warranted to be true and are offered to the Company as a consideration of the contract, which I hereby agree to accept, and which shall not take effect unless and until the first premium shall have been paid, during my continuance in good health," &c.

That the said application was made in duplicate and each duplicate was signed by the said Cilbey L. Wiggins.

2. That the said application was made in duplicate for the reason that, as the amount of insurance applied for exceeded the sum of $30,000, the Insurance Company under its rules governing such cases, required an examination of the applicant by two physicians and two separate reports by them. Each application blank contained a medical examiner's report to be filled in by the medical examiner with answers to certain questions addressed to the applicant and to be signed by the applicant who, in each instance, was required to make and did make a certificate:

> "I hereby certify that my answers to the foregoing questions are correctly recorded by the Medical Examiner.
>
> CILBEY L. WIGGINS,
> Signature of the person examined."

The reports also required that the signatures of the applicant be witnessed in each case by the medical examiner so recording the answers.

3. As a part of said application so made in duplicate appeared two medical examiner's reports, each signed and certified by Cilbey L. Wiggins and one signed by J. S. Turberville, M.D., medical examiner, as witness, and the other by George C. Kilpatrick, M.D., medical examiner, as witness.

4. That the petitioner, Insurance Company, believed and relied upon the truth of the statements set forth in said application, including the medical examiner's reports, and believed that in each instance the said Cilbey L. Wiggins had actually been examined by Drs. Turberville and Kilpatrick and that Cilbey L. Wiggins had actually certified that the questions and answers set forth in the medical examiner's report were put and answered; believed that the answers were true and that the said certificate made by Cilbey L. Wiggins in each instance was true in fact. That, as a matter of fact, neither of said medical examiners examined the said Cilbey L. Wiggins and the said reports were untrue in all respects; that the certificate of Cilbey L. Wiggins was untrue and thereby the petitioner, Insurance Company, was deceived and defrauded.

5. That the statements purporting to have been made by the said Cilbey L. Wiggins were untrue in that he failed to state illnesses and medical treatment that he had had within five years previous to the date of the application; that he was

not in good health; that he concealed the fact that he had been operated upon at a sanitarium and had concealed the names of physicians whom he had consulted and who had treated him within five years prior to the date of the application. That none of those matters was known to the Insurance Company at the time it issued the policies and by reason of the concealment of those facts the Insurance Company was deceived and defrauded and would not have issued the policies in suit had it known the facts.

6. That within a short time prior to the time that said Cilbey L. Wiggins applied to the petitioner, Insurance Company, for the policies suit he had applied to the Prudential Insurance Company for a policy in the sum of $40,000 and that that Company had declined to issue a policy upon the life of the said Wiggins and that Wiggins had concealed that fact from the Insurance Company and had stated in his application that he had never made an application for life insurance to any company or association upon which a policy had not been issued.

The Insurance Company offered at the close of each of its pleas to return to the respondents the sums of moneys paid to it as premiums on the policies in suit. (Rec., 55-65).

The policies and applications, which are made a part of the policies, provide that the statements made by the insured in the absence of fraud shall be deemed representations and not warranties.

The plaintiffs filed replications to the petitioner's pleas, setting forth (in addition to denials

that the pleas were true) that the petitioner, Insurance Company, had knowledge of the facts at and before the issuance of the policies.

At the conclusion of the evidence in the case, petitioner moved the court to direct a verdict in its favor (Rec. 150). The motion was denied and to this denial petitioner filed its exception, which was duly allowed by the court. (Rec. 151, 82).

Before the argument of counsel began and before the retirement of the jury, petitioner requested the court to give to the jury certain charges bearing upon the several defenses raised by the petitioner's pleas, which will be found fully set forth in this brief (Pp. 96-104). The court refused to give the requested charges and to its refusal petitioner filed its exceptions and these exceptions were allowed. (Rec. 82). The petitioner also duly excepted to the charge as made. (Rec., pp. 149-150). The trial resulted in a verdict and judgment for the plaintiffs against the petitioners for $30,648. with interest amounting to $7,462.88 together with 12½% as attorney's fees, amounting to $7,763.86, making a total of $42,874.74. (Rec. 71). From the judgment so recovered a writ of error was taken by your petitioner to the Circuit Court of Appeals for the Fifth Judicial Circuit.

The grounds upon which a reversal of the judgment was sought were based upon the following alleged errors committed at the trial.

First.—The refusal of the court to direct a verdict for the defendant (petitioner, insurance company).

Second.—The refusal of the court to charge the jury as requested by the insurance company.

Third.—The errors of trial judge in charging the jury.

The judgment of the District Court was affirmed by the Circuit Court of Appeals for the Fifth Judicial Circuit. The opinion appears at pages one fifty-seven to one sixty-seven of the Record.

Petitioner then filed with this Honorable Court a petition for a writ of certiorari and this petition was granted and the cause, by certiorari, brought to this Honorable Court for review.

Main Questions Presented.

The main questions presented relate to (a) the effect of certain statements made by Wiggins in his applications to the Insurance Company for the policies in suit which, the Insurance Company contends, were a part of the contract and related to matters material to the risk and being untrue avoided the policies; (b) the effect of certain certificates made by Wiggins when applying for the policies certifying that he had been examined by two medical examiners and that they had correctly recorded answers to questions in the application which certificates the Insurance Company contends were a part of the contracts, that they were false and untrue for the reason that there was no medical examination of Wiggins and none of the questions was asked by the medical examiners, or either of them, and no answer given

to the medical examiners and that therefore the policies were avoided, and (c) the construction and effect of a statute of the State of Florida relating to "agents" of insurance companies.

Statement of Facts.

One Cilbey L. Wiggins, a resident of Pine Barren, in the State of Florida, on the 3rd day of November, 1908, applied to the Prudential Insurance Company of America for a policy of insurance in the sum of $40,000. The Prudential Insurance Company declined to issue the policy and the application was withdrawn (Rec. pp. 110-112).

Wiggins' application to the Prudential Insurance Company was obtained by one John C. Hogue of Mobile, Alabama, a soliciting agent in the employ of the Prudential Insurance Company (Rec. p. 134).

The application was under consideration by the Prudential Insurance Company for several weeks before it was finally withdrawn (Rec. p. 111).

Thereupon, Hogue, still an agent of the Prudential and in no way connected with this petitioner, procured two application blanks used by the latter in its business. As will appear by an inspection of the application blank, it is divided into three parts. The first part contains the proposal of the applicant and contains a schedule of questions to elicit the name, residence, age, occupation, place and date of birth, amount of insurance desired, details of insurance in other companies and applications for insurance pending before other companies and certain other personal information, and is signed by the applicant and the soliciting agent. The second part consists of a medical examiner's re-

port to be filled in during and upon the conclusion of a medical examination of the applicant and that part of the application is headed "Medical Examiner's Report". That part is also required to be signed by the applicant who must certify that his answers to the questions put to him have been correctly recorded by the medical examiner and the signature of the applicant must be witnessed by the medical examiner who makes the examination. There is a third part of the blank which is headed "Medical Examiner's Report (continued)", and that part of the blank is required to be signed by the examiner alone.

Hogue, according to his testimony, secured Wiggins' signature to the first part of one of the applications on or about December 15, 1908. (Rec. p. 123).

Within a few days following, Hogue took both applications and delivered one of them to a Dr. George C. Kilpatrick, a resident of Pine Barren, Florida. (Rec. p. 125).

Hogue, representing himself to Dr. Kilpatrick to be an agent of the petitioner, Insurance Company stated to Kilpatrick that he wanted an insurance examination of Wiggins; that Dr. J. C. McLeod had a short time previously examined Wiggins for the Prudential Life Insurance Company and that in view of that examination it would not be necessary for him, Kilpatrick, to actually examine Wiggins. (Rec. p. 89).

Dr. Kilpatrick thereupon completely filled in and signed the medical examiner's report without first seeing and examining Wiggins. Kilpatrick then delivered his report to Hogue. (Rec. p. 90).

Hogue then took the two applications to Dr. J.

S. Turberville, a physician residing at Century, Florida, and asked him to fill in and sign one of the medical examiner's reports as a confirmation of Dr. Kilpatrick's report. Dr. Turberville did not see Wiggins at all and made no examination of him. He simply made a copy of Dr. Kilpatrick's report and signed it and gave it to Hogue. (Rec. p. 85).

The application containing the "medical examiner's reports" of Dr. Kilpatrick and Dr. Turberville, signed by the doctors and with a certificate at the foot of each signed by Wiggins, certifying that the answers were correctly recorded by the medical examiners, were by Hogue delivered to one J. R. Tapia, at the time the manager at Mobile, Alabama, of the Prudential Insurance Company (Hogue's Company), with instructions to get in touch with J. D. Torrey, the district agent of the petitioner at Mobile, Alabama, and to turn the papers over to him. (Rec. p. 125).

The papers were so delivered to Torrey (Rec. p. 143) and were by him in turn sent to Cecil Willcox, the manager of the petitioner at Jacksonville, Florida. Willcox, upon receipt of the papers, sent them to the home office of the Insurance Company in New York. (Rec. p. 94).

The officers of the Insurance Company in New York, believing that the papers were genuine and in every respect regular, and without any knowledge of the way they had been prepared, approved the issuance of the four policies of life insurance on the life of Wiggins. The policies were issued and sent forward to the petitioner's manager at Jacksonville for delivery to Wiggins, and were delivered to him. Wiggins died within two years of the issuance of the policies, his death

having been caused by heart disease. **His death occurred before the expiration of the two years' incontestable period fixed in the policies** (Rec., pp. 9, 19, 29, 39).

Proofs of death were filed with the Insurance Company at its home office and upon payment being refused the executors brought this suit.

Specification of Errors relied upon.

First.—The refusal of the Court to direct a verdict for the defendant (petitioner insurance company).

Second.—The refusal of the Court to charge the jury as requested by the insurance company.

Third.—The errors of trial judge in charging jury.

POINT I.

The Trial Court committed error in refusing petitioner's motion to direct a verdict in its favor.

Before the argument of counsel began and before the retirement of the jury the petitioner requested the Court to direct a verdict in its favor. To the refusal of the Court to direct a verdict the petitioner excepted (Rec., pp. 150-151, 75).

Assignment of error, No. 9. (Rec., pp. 75, 150).

The Trial Court should have directed a verdict:

(A) Because on the undisputed evidence Wiggins committed a fraud upon the Insurance Company by procuring the issuance of the policies through false certificates made by him certifying that the two medical examiners had correctly recorded answers to the questions contained in their reports.

(B) Because on the undisputed evidence Wiggins made false and untrue answers in the medical examiners' reports respecting matters material to the risk.

(C) Because on the undisputed evidence the answers which Wiggins certified had been correctly recorded were not only false and untrue but were known by him to be false and untrue, and were therefore fraudulently made.

(A) The Trial Court should have directed a verdict because Wiggins procured the issuance of the policies through fraud by certifying that the answers to the questions had been correctly recorded by the medical examiners.

There is some doubt as to just when the duplicate applications which were made for the insurance in question were prepared and signed. One J. R. Tapia, a witness for the respondents, who at the time the policies in suit were applied for, was the manager for the Prudential Insurance Company of America in south and southeast Alabama and who, at that time, resided and had his office in Mobile, Alabama, testified, after examining the duplicate applications, that the application which was dated December 15, 1908, was filled out

by the said J. C. Hogue who wrote the answers Nos. 1 to 22 and filled out the application in his (Tapia's) office in the Bank of Mobile Building in Mobile, Alabama, in December, 1908, and that Hogue wrote out the answers to questions Nos. 1 to 22 in his (Tapia's) presence (Rec. p. 142).

Tapia further testified that the duplicate application blank, also dated December 15, 1908, was written out in his (Tapia's) presence in his office at Mobile, Alabama, by one J. D. Torrey who at that time was an agent for the petitioner, The Mutual Life Insurance Company at Mobile, Alabama (Rec. p. 142). Tapia testified that the duplicate was written out by Torrey in December, 1908, and that Torrey got his information by copying from the application taken by J. C. Hogue; that at that time Torrey also corrected the figures in the original application by changing the amount from $30,000 to $30,648 and by changing the place of signature from Mobile, Alabama, to Pine Barren, Florida (Rec. p. 142).

Tapia further testified that after the applications were so filled out they were delivered to J. D. Torrey, who signed both applications as soliciting agent of the petitioner on December 15, 1908, and that Wiggins, the applicant, was not present at the time (Rec. p. 142).

Hogue, on the other hand, testifies that he met Wiggins, the applicant, at Atmore, Alabama; that he rode on the train with Wiggins to Flomaton; that "we got off the train together at that point going into the depot waiting room, where I took the data for this application and where he signed this application" (Rec. p. 125). Hogue says that as soon as Wiggins signed the application Wiggins deliv-

ered it to him (Hogue) (Rec. p. 125). Hogue is quite positive that he completed the answers to all the questions on the application from 1 to 22 inclusive at the time Cilbey L. Wiggins signed the application with the exception of Question 16, "giving the commuted value on the total policies *we proposed having issued out for his consideration and final decision*", and that all of the answers were written out at Flomaton, Alabama, and that after he had written the answers down from the information received from Cilbey L. Wiggins, he (Wiggins) signed the applications. Hogue also testified that Wiggins communicated the information set out in the application to him, Hogue, and to him only (Rec. p. 126).

Hogue then states that as far as his knowledge went the applications were never again in the possession of Wiggins except that Wiggins probably saw them at the time that he (Wiggins) signed the medical examiner's reports (Rec., p. 125).

Hogue then took the applications and delivered one to George C. Kilpatrick, a physician residing at Pine Barren, Florida (Rec. p. 125).

Dr. Kilpatrick testified:

> "On or about December 15th, 1908, I was not a regular examiner of The Mutual Life Insurance Company, and had never made an application (the witness probably meant "examination") for any insurance company. On or about December 15th, 1908, J. C. Hogue, who represented himself to be an agent of The Mutual Life Insurance Company, came to my office in Pine Barren, Florida, and told me that he wished to get me to make insurance examination of C. L. Wiggins; that it was not the custom of the company to appoint as medical examiners any physician who

had practiced less than twelve months, but that he thought he could get me appointed. He said that Dr. J. C. McLeod had a short time previously examined Mr. Wiggins for The Prudential Life Insurance Company which I knew to be a fact, and that in view of this examination it would not be necessary for me to actually examine Mr. Wiggins, and, relying upon his representations to me, I signed the medical examiner's report as shown by the photographic copy attached to these interrogatories without first seeing and examining Mr. Wiggins; but, as stated in my answer above, I had know Mr. Wiggins intimately about eight months and from this acquaintance with him knew, in a general way, the facts to be as stated in said report. A day or two after this report was signed and delivered by me to J. C. Hogue, I saw Mr. Wiggins and made a partial examination of him, examining his heart, and also made a urinary examination several times, microscopically and chemically, and found both apparently sound and all right" (Rec. pp. 89-90).

Dr. Kilpatrick testified positively that he received the application from Hogue in his (Kilpatrick's) office, that he filled in the medical examiner's report completely without making any examination whatever of Wiggins and then delivered the application (containing the so-called "medical examiners' report") to Hogue, "but such examination of C. L. Wiggins as was made by me was made after said report had been signed by me and delivered to J. C. Hogue" (Rec. p. 87). Dr. Kilpatrick testified that he did not put to Wiggins the questions set forth in the medical examiner's report and did not receive from Wiggins the answers stated there and made no examination of Wiggins at all except a partial examination *after*

he had signed the medical examiner's report and returned it to Hogue. Dr. Kilpatrick also stated that he did not see Cilbey L. Wiggins sign the certificate reading as follows:

> "I certify that my answers to the foregoing questions are correctly recorded by the Medical Examiner."

but believes the signature to be Wiggins' **(it was admitted on the trial that the signatures attached to the applications were the signatures of Cilbey L. Wiggins)** (Rec. p. 119).

Hogue then took the two applications to Dr. J. S. Turberville, a physician at that time residing at Century, Florida. Dr. Turberville did not see Wiggins at all and made no examination of any description of Wiggins. He did not put to Wiggins the questions that appear in the medical examiner's report nor receive the answers therein set forth from Wiggins.

Dr. Turberville testified (Rec. p. 85), on the trial of the action:

> "Mr. Hogue presented and asked me if I knew Dr. Kilpatrick well. I said I had worked with him. He asked me to sign this as a confirmation of Dr. Kilpatrick's report as to the examination; I am not sure whether he said—or whether it was an impression of mine, my understanding is—he said Dr. Kilpatrick was under age for life insurance examiner; that is, he was young in his profession; he had not practiced medicine but three years, and he wanted an examination for that reason; ordinarily life insurance physicians are accepted as examiners after they have practiced three years, and he simply wrote those answers and I copied them."

Dr. Turberville further testified (Rec. p. 84) as follows:

"Q. This purports to be an application to the Mutual Life Insurance Company by C. L. Wiggins, for insurance, a part of which is a medical examiner's report, which you say you signed; it appears of date Pine Barren, Florida, 16th of December, 1908; did you examine Mr. Wiggins, doctor, as purported to be set forth here?

"A. No, sir.

"Q. You did not?

"A. No, sir.

"Q. Did you fill in the answers to the questions as they are put in here?

"A. Yes, sir.

"Q. This paper purports to be signed by Cilbey L. Wiggins under the following words: 'I hereby certify that my answers to the foregoing questions are correctly recorded by the medical examiner, 'Cilbey L. Wiggins' ". Did you see Wiggins sign that?

"A. No, sir.

"Q. From what source or upon what information were you acting, if you did not examine Mr. Wiggins as this paper purports—when you filled in these answers?

"A. That is a copy of the report of Dr. Kilpatrick's examination of Mr. Wiggins, and it was signed as a confirmation of his examination—to that understanding.

"Q. Did you ever see Mr. Wiggins for the purpose of making an examination of him for life insurance?

"A. No, sir.

"Q. Then, Mr. Wiggins did not sign this examination in your presence?

"A. No, sir.

"Q. He answered no questions to you?

"A. No, sir.

"Q. Did you ever ask him any questions?

"A. Not with respect to life insurance.

"Q. What did you do with this report after you filed it in and signed it?
"A. I gave it to one Mr. Hogue."

He could not testify whether Wiggins' signature was on the paper when it came into and left his hands (Rec. p. 85).

Hogue testified further that after Dr. Kilpatrick returned the papers to him he delivered them personally to J. R. Tapia, the manager of the Prudential Insurance Company of America, at his office in Mobile, Alabama, with instructions that he call up or get in touch with Mr. J. D. Torrey, District Agent for The Mutual Life Insurance Company of New York at Mobile, Alabama, and turn the papers over to him (Rec. p. 125). Hogue makes no reference whatever to Dr. Turberville in his testimony except that in response to an inquiry whether Wiggins was present when the answers to the medical examiner's report were written out by Dr. Turberville, he stated that he did not know. (Rec. p. 130).

Hogue testified that Wiggins did sign the medical examiner's report of Dr. Kilpatrick (Rec. p. 128) but did not say that Dr. Kilpatrick examined Wiggins either by putting to him the questions stated in the report or by an actual physical examination of him (Rec. pp. 128-129, 131).

Torrey, the agent of the petitioner, Insurance Company, then sent the papers to the office of one Cecil Willcox, who was the manager of the Insurance Company at Jacksonville, Florida, and they were forwarded from that office to the petitioner's, Insurance Company, home office in New York City (Rec. pp. 93-94).

Neither Hogue, nor Kilpatrick, nor Turberville, nor Tapia, nor Torrey, nor Wiggins informed the Insurance Company of what had actually happened in the preparation of the applications as they were finally delivered to the Insurance Company and that Company, at no time previous to the death of Wiggins, had any knowledge of the deception that had been practiced upon it. It received the applications in the usual course through the mail; it believed that they had been regularly signed and executed; it believed that Wiggins had actually been examined by Drs. Turberville and Kilpatrick; it believed that all the questions had actually been put to him by the medical examiners and that he had answered them as he had certified; it believed that Wiggins had told the truth in response to the questions put to him. **Believing all these things to be true and in full reliance upon their being true, the Insurance Company accepted the applications and issued the policies in suit** (Easton's deposition, Rec. pp. 114-119).

These facts are undisputed; and, indeed, it may be said they are conceded because the respondents filed a replication in which they set forth that the petitioner's agents knew that Wiggins had not been examined by Dr. Turberville and that two separate medical examinations of Wiggins had not been made; knew of the operation that had been performed; knew that Wiggings had applied to the Prudential for $40,000 and had been rejected;

knew the various treatments by physicians which Wiggins had concealed **and that as its agents and medical examiners knew of these facts, the petitioner is estopped to deny liability on the policies.** (Rec. p. 68).

There is no basis anywhere in the evidence in this case for a finding that Wiggins exercised good faith. On the contrary the only conclusion that can be drawn from the evidence is that he was a conscious party to a fraud perpetrated on the Insurance Company.

This glaring fraud, the Insurance Company contends, stands as an absolute bar to any recovery on these policies without any regard whatever as to whether or not Wiggins was in good health when he caused the applications to be submitted to the Insurance Company.

The Insurance Company was entitled to a medical examination by two physicians. It was entitled to have the questions contained in "Medical Examiners' Reports" actually put to Wiggins and fully, completely and truthfully answered by him. Wiggins knew that he had not been examined, that the questions had not been put to him and that the answers recorded were not true. Hence, he knew that he was not acting in good faith in connection with the application made to the petitioner for the policies in suit.

(B) The Trial Court should have directed a verdict because on the undisputed evidence Wiggins made false and untrue answers in the medical examiners' reports, respecting matters material to the risk.

The applications which Wiggins signed in duplicate contained the following provision:

> "This Application made to the Mutual Life Insurance of New York is the basis and a part of the proposed contract of insurance, subject to the charter of the company and the laws of the State of New York. I hereby agree that all the following statements and answers, *and all those that I make to the company's medical examiner, in continuation of this application, are by me warranted to be true and are offered to the company as a consideration of the contract*, which I hereby agree to accept, and which shall not take effect unless and until the first premium shall have been paid, during my continuance in good health." (Rec., pp. 14-15, 171, 174).

The policies contained the following provision, among others:

> "This policy and the application herefor, copy of which is indorsed hereon or attached hereto, constitutes the entire contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the insured shall avoid or be used in defense to a claim under this policy unless contained in the written application herefor, a copy of which is indorsed hereon or attached hereto." (Rec. pp. 9, 19, 29, 39).

The policy also contained the following provision:

> "Agents are not authorized to modify this policy or to extend the time for paying a premium." (Rec., pp. 14, 24, 34, 44).

The following are the important questions contained in the applications and medical examiners' reports and the answers which were filled in by

Hogue and the medical examiners, and which answers Wiggins certified had been correctly recorded by the medical examiners:

"20. I have been accepted for insurance under the following policies in this company, none.

"21. I am insured in other companies and associations as follows:

"Prudential, $30,000; Equitable, $20,000.00; Fraternal, $5,000; and in no others.

"22. I have never made an application for life insurance to any company or association upon which a policy has not been issued on the plan and premium rate originally applied for, except as to the following companies or associations: **None, and no such application is now pending or awaiting decision."** (Rec. pp. 15-16, 172, 176).

"3. (a) What illness, disease or accidents have you had since childhood? (The examiner should satisfy himself that the applicant gives full and careful answer to this question).

"Name of disease: **Pneumonia.**

"Number of attacks: **One.**

"Date of each: **1899.**

"Duration: **30.**

"Severity: **Not severe.**

"Results: **Complete recovery.**

"Date of complete recovery: .....

"3 (b) Have you stated in your answer to question 3(a) all such illnesses, diseases or accidents? **Yes.**

"4. State every physician whom you have consulted in the past five years. **None.**

"Name of Physician.....

"Address: .....

"When consulted: .....

"Nature of complaint. Give full details above under Q. 3(a). .....

"8. Have you undergone any surgical operation? **No.**

"13(a). Have you ever been under treatment at any asylum, cure, hospital or sanitarium? **No.**

"16. Have you ever been examined for a policy in any company or association which was not issued as applied for? **No.**" (Rec. p. 17).

An applicant for life insurance knows that no life insurance company and no other organization insuring the lives of its members, will knowingly accept an applicant who is not in good health. He knows that the only intelligent way in which the insurance company can pass judgment on the risk offered is by having a medical examination of the risk made by one or more physicians competent to make such an examination.

The court will take judicial notice that insurance companies require a medical examination as a condition precedent to the issuance of a policy (Taylor *vs.* G. L. A. O., W. W. 101 Minn. 72 at 77; 111 N. W. 919).

An applicant for life insurance, if he is of ordinary intelligence, knows that when a life insurance company, in connection with the medical examination, asks questions with respect to the past health of the applicant, prior consultations with physicians, prior illnesses, diseases, surgical operations and the like, that the questions are not asked as a matter of idle curiosity but are asked for the purpose of putting the insurance company in possession of all that may be learned concerning the applicant as an insurance risk, not only from the actual physical examination but from his past medical history.

The physical examination will disclose many things to the trained physician but the past medical history of the applicant, usually, is possessed by himself alone and the physicians who may have treated him and inquiry of the applicant is therefore necessary for the purpose of getting that complete past medical history.

No matter how indulgent courts are toward policy-holders, all of the decisions hold that an applicant for life insurance must exercise good faith when answering the questions put to him by the life insurance company and that he must not suppress any information which the insurance company is entitled to have before it in determining the character of the risk which it is asked to assume.

The application of the petitioner Insurance Company contained questions simple in form, calling for exact, complete and explicit information; and particularly is that true in regard to the questions to be put by the medical examiners and answered by the applicant.

The attitude required of an applicant for life insurance is well defined by the opinion of this Court in Moulor *vs.* Am. L. I. Co., 111 U. S. 335. Mr. Justice Harlan (at pages 345-6) said:

> "Looking at the clauses of the application, in connection with the policy, it is reasonably clear—certainly the contrary cannot be confidently asserted—that what the company required of the applicant, as a condition precedent to any binding contract, was, that he would observe the utmost good faith towards it and make full, direct and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation or concealment of facts with which the company

> ought to be made acquainted; and that by so doing and only by so doing, would he be deemed to have made fair and true answers."

The only way in which the petitioner could get any accurate knowledge bearing upon the physical condition of Wiggins at the time he applied for the policies of insurance in suit was by having him submit to a medical examination. The only way in which it could learn the truth as to his present and previous health, his previous illnesses and diseases, the physicians whom he consulted, the sanitariums and hospitals of which he had been an inmate, and the surgical operations he had had was by asking him the questions set forth in the application and receiving full, complete and true answers thereto. Every reputable life insurance company recognizes the truth of this and in practice requires an applicant to make answers to written questions carefully framed to elicit the truth respecting these material matters.

The Materiality of the Statements and Warranties.

The questions in regard to previous illnesses, consultation of physicians and application for insurance call for matters material to the risk.

The policies in suit provide:

> "All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the Insured shall avoid or be used in defense to a claim under this Policy unless contained in the written application herefor, copy of which is endorsed hereon or attached hereto". (Rec., pp. 10, 19, 29, 39).

There is no claim that a copy of the application was not attached to each policy. As a matter of fact, the declaration as originally filed by the respondent had attached to it not only the policies, but the applications upon which they were granted, and there is no claim made that copies of the applications were not attached to the policies when they were delivered to Wiggins.

There can be no question about the materiality of the questions relating to prior consultations with physicians and prior applications for insurance. They are material as a matter of law.

The Circuit Court of Appeals recognizing the materiality of the representation that there had been a medical examination, and the representation that there had been no previous application for insurance which had been rejected or not passed upon favorably, said (Rec., page 160):

> "This leaves for consideration the representation of the insured that he had been examined by Dr. Turberville, defendant's medical examiner, and that the answers recorded by the medical examiner in his report were correct. In truth, there was no such examination had, and the insured must have known that there was none, and the representation that there had been one was a material one. So with regard to the representation of the insured that there had been no previous application for insurance made by him and rejected or not passed upon favorably by the insurance company. This was untrue, must have been known to have been untrue by the insured when he made it, and it was material. Either of these two last representations would be sufficient to avoid the policies, unless the defendant is estopped to rely upon them, by reason of its knowledge of their falsity. It had such knowledge, if at all, because of the

knowledge of its agents and examiners, who handled the matter for it."

It is our contention that the questions relating to previous illnesses, consultation of physicians, operations and treatment in sanitariums respected matters which were material to the risk as a matter of law.

Consultation of Physicians.

With reference to the prior consultation of physicians, it appears that Wiggins first consulted Dr. William P. Dey, of Pine Barren, Fla. (Rec., page 103). The substance of his testimony is as follows:

"During the summer of 1907 I treated C. L. Wiggins for what was thought to be neuralgia in the head. I was not certain what it was. In fact, I did not know what the condition was, and called in an eye, ear, nose and throat specialist, Dr. F. M. Thigpen, of Pensacola, Florida. He did not know what it was. I advised Mr. Wiggins thinking it was neuralgia possibly due to malaria, although I never found any malaria parasites in his blood, to go to Hot Springs, Arkansas, which he did. His neuralgia, or the pain in his head continued, and he went, I think, to Atlanta, Georgia. From Atlanta he came back to Pine Barren, and then he and I went to Montgomery, Alabama, and consulted Dr. Charles Thigpen, who decided to cut into the lower jaw to see what the trouble was. He found it to be a tooth in the interior of the bone."

* * * * * * * *

"Yes, Mr. Wiggins was operated on in Dr. Watkins' infirmary in Montgomery, Alabama, by Dr. Charles Thigpen, assisted by myself. Incision was made into the lower

jawbone after having extracted one of the molar teeth, part of the jawbone was chiseled off, and a tooth was discovered, which was also extracted, the cavity scraped, the wound packed. Mr. Wiggins was in the hospital about ten days or two weeks. The wound healed fully in about four weeks."

Dr. Dey also said (Rec., p. 105):

"In the summer of 1907, Mr. Wiggins consulted Dr. Calhoun, of Atlanta, Georgia, for this supposed neuralgia of his face. Dr. Calhoun advised an exploratory incision into the jaw to try to locate the cause of the trouble."

Dr. Charles A. Thigpen testified that he was an eye, nose, ear and throat specialist residing at 1200 South Perry Street, in the City of Montgomery, Alabama, and was consulted by C. L. Wiggins on July 16th, 1907, and that he performed an operation for cystic enlargement of the lower jaw, due to an impacted wisdom tooth; that the operation was performed while C. L. Wiggins was at Highland Park Sanitarium and was as follows:

"The operation was performed for the aforesaid trouble I have just mentioned; associated with which (this trouble) was severe neuralgia, pain in the jaw, and right side of the head, and Dr. I. L. Watkins gave the anesthetic and my associate, Dr. W. G. Thigpen, assisted in the operation. The jawbone was opened and the whole tooth removed. I found the tooth had grown down the wrong way; instead of growing upward, it grew downward and forward, and came in contact with the tooth in front of it, and caused the enlargement of the bone and the pain. The operation was done at Dr. Watkins' infirmary, Highland Park Sanitarium".

"C. L. Wiggins was confined in the hospital for ten days, and was under my direct care from July 16th, 1907, to August 13th, 1907, during which time he was at some hotel in the city. I think it was the Exchange Hotel, and was under my supervision for about three months".

"I did not examine his general condition only for my special work. I did not make a physical examination of him. I did not know as to the condition of his health generally." (Rec. p. 100).

Surely it cannot be seriously contended that the suppression of the names of these physicians, the nature of the attack, the fact of the operation and treatment at the sanitarium, did not relate to matters material to the risk.

It is clear that Wiggins had been suffering intensely and for a long time prior to the operation and that an operation was necessary, and it cannot be that within a year after, on or about the 16th day of December, 1908, when he applied for the policies in suit, he could have forgotten those matters or regarded them as so trivial as not worthy to be mentioned.

If Wiggins had acted in good faith and made truthful answers to the questions contained in his application, the petitioner would have been in possession of very important facts at the time it was considering Wiggins' application for the policies in suit.

It would have had the information that in November, 1908, about a month previous to the date of his application to the petitioner, he applied to the Prudential Life Insurance Company for $40,000. of insurance and that he underwent an examination for said insurance in the Prudential and

that that Company declined to issue any policy on his application.

It would also have had the information that he had consulted Dr. W. P. Dey of Jacksonville in the summer of 1907 (Rec. p. 105), and was advised by him to visit a sanitarium, that this advice was given after Dr. Dey had called in Dr. F. M. Thigpen, a specialist of Pensacola, Fla. It would have been informed that in July, 1907, he was an inmate of the Highland Park Sanitarium at Montgomery, Alabama, for ten days and that while there an operation was performed, upon him by Dr. Charles Thigpen, Dr. F. M. Thigpen, Dr. Dey and Dr. Watkins assisting at the operation, that Wiggins was under the direct care of Dr. Charles A. Thigpen from July 16, 1907 to August 13, 1907, while he was in the hospital and for about three months following while he was at the Exchange hotel at Montgomery, Alabama (Rec. pp. 97-99).

There was no question for the jury because it is undisputed that all of these things occurred.

Under the provisions of the policy sued upon, it having been conclusively established that Wiggins made false statements in regard to matters material to the risk, as a matter of law, there cannot be a recovery.

Aetna Life Insurance Co. *vs.* Moore, 231 U. S. 543.

Prudential Insurance Co. *vs.* Moore, 231 U. S. 560.

Thorner *vs.* Hancock Mutual Life Ins. Co., (1915) 164 App. Div. 34; 149 N. Y. Supp. 345;

Archer *vs.* Equitable Life Assurance Society of the United States, Appellate Division, (1915) page (168 App. Div. p. ; 53 N. Y. Law J., page 1831).

In the Thorner case it was held (164 App. Div. at p. 37):

> "He (the insured) did know that he had consulted a physician. Suppose it were the fact, although the indications are entirely to the contrary, that he had then been advised by Dr. Fuhs that he was suffering from no disease, illness or ailment whatever, defendant was entitled to know all of the facts respecting his conduct, that it might govern its conduct accordingly."
>
> "The materiality of a representation is largly measured by the known consequences thereof. It is impossible to attribute to the insured but a single purpose in falsely stating to defendant that he had no "symptons" of "ailment" and had not "consulted a physician". It was to avoid, if possible, further examinations by defendant's physicians, the consequences of which he might well dread."

Archer *vs.* Equitable Life Assurance Society of the United States (*supra*) is cited for the purpose of indicating the construction placed by the New York courts on Section 58 of the New York Insurance Law (Laws of New York, 1909, Ch. 33, §58), of which statute the provision in the policy in regard to representations is a copy. The Appellate Division of the First Department, 168 App. Div. at p. , said:

> "The clause, as I understand it, means that if the insurer intends to claim that it was induced to enter into a policy by virtue of any statement of the insured it must express that

statement in the policy or attach it thereto, and such statement so attached shall be deemed a representation and not a warranty; *but any statement so attached, whether a representation or not, shall, upon proof of fraud, void the policy.*"

A similar statute was before the Supreme Court of North Carolina in *Gardner* vs. *North State Life Insurance Company, (1913) 163 N. C. 367; 79 S. E. 80; 49 L. R. A. (N. S.) 714*, where the Court said (163 N. C. at p. 375):

"It may be stated as a general rule that where, in an application for insurance, a fact is specifically inquired about, or the question is so framed as to call for a true statement of the fact, or to elicit the information desired, reason and justice alike demand that there should be a fair and full disclosure of the fact, or at least a substantial one. 3 Cooley, Briefs on Ins., p. 2009 (d). Our case is not essentially different from Alexander *vs.* Metropolitan L. Ins. Co., 150 N. C. 536, 64 S. E. 432, in which this court said: 'The Company was imposed upon (whether fraudulently or not is immaterial) by such representation, and induced to enter into the contract. In such case it has been said by the highest court that, 'assuming that both parties acted in good faith, justice would require that the contract be canceled, and premiums returned.' New York L. Ins. Co. *vs.* Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837,—' citing Bryant *v.* Metropolitan L. Ins. Co., 147 N. C. 181, 60 S. E. 983, as decisive of the question. *Our statute (Revisal of 1905, §4808) affirms this view; for, while it declares that all statements in an application for insurance shall be construed as representations merely, and not as warranties, it further provides that no representation, unless material or fraudu-*

lent, shall prevent a recovery, the meaning of which plainly is that a material representation shall avoid the policy, if it is also false and calculated to influence the company, if without notice of its falsity, in making the contract at all, or in estimating the degree and character of the risk, or in fixing the premium. Bryant *v.* Metropolitan L. Ins. Co., *Supra.* Our case is well within this rule. **It is not necessary, as said in Fishblate's case, that the act or conduct of the insured, which was represented by him in the application, should have contributed in some way or degree to the loss or damage for which the indemnity is claimed. Whether it was material depends upon how, if at all, it would have influenced the Company in the respect we have just stated. The determining factor, therefore, in such case is whether the answer would have influenced the company in deciding for itself, and in its own interest, the important question of accepting the risk, and what rate of premium should be charged.** The questions generally are framed with a view to estimating upon the longevity of the applicant, and any answer calculated to mislead the company in regard thereto should be considered as material. There are some contingencies that cannot be provided against; but the company is entitled to have a fair and honest answer to every question, which will enable it to exercise its judgment intelligently, and to have the necessary information as a basis upon which to make its calculations, although its best deduction therefrom may only approximate the actual result in the particular case. 3 Cooley, Briefs on Ins., pp. 1952, 1953; Aetna L. Ins. Co. *v.* Conway, 11 Ga. App. 557, 75 S. E. 915. The applicant is required to act in the utmost faith in giving the information. Aetna L. Ins. Co. *v.* Conway, *supra.*"

Again in *March* vs. *The Mutual Life Insurance Company* (*1898*) *186 Pa. St. 629, 641, 642; 40 Atl. 1100*, in construing a substantially similar statute, the Supreme Court of Pennsylvania said (186 Pa. St. at p. 641):

> "The several assignments of error in this case raise practically the same question. That question arises upon the reading of the Act of June 23, 1885, P. L. 134. The first section provides: 'Whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application made in good faith by the applicant shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk.' The meaning of this language is perfectly plain. A misrepresentation or untrue statement in an application, if made in good faith, shall not avoid the policy unless it relate to some matter material to the risk. If it does relate to such matter the act is inapplicable. If the matter is not material to the risk, and the statement is made in good faith, although it is untrue it shall not avoid the policy. As we said in Hermany *v.* Fidelity Mutual Life Association, 151 Pa. 17, this act has effected a change in life insurance contracts, and a very wise and wholesome change it is. It provides against the effect which formerly attached to warranties as to many frivolous and unimportant matters contained in the questions and answers set forth in the applications, which often were of no consequence as to the risk involved, but which the courts were obliged to uphold simply because they were warranties. This class of merely technical objections to recovery is now swept away. Ordi-

narily questions of good faith and materiality are for the jury, and where the materiality of a statement to the risk involved, is itself of a doubtful character, its determination should be submitted to the jury. **But it was never intended by the act of 1885, nor did that act assume, to change the law in cases where the matter stated was palpably and manifestly material to the risk, or where it was absolutely and visibly false in fact."**

It appeared that the insured in her application stated that she had had no serious illness; that she had not been attended by a physician and that she had not been rejected by any other Company.

The Court held that on the uncontradicted evidence these answers were absolutely false and that it was the duty of the Trial Court to direct a verdict in favor of the insurance company.

The Circuit Court of Appeals (Second Circuit) construing the Pennsylvania statute, said: *Equitable Life Assurance Society* v. *Kieper, (1908) 165 Fed. 595 (at pp. 600-602); 91 C. C. A. 433.*

> The second question to be determined, is, whether under the act of assembly of Pennsylvania of June 23, 1885, (P. L. 134), the statement by the insured, that he had never had any serious illness, etc., if made in good faith, related to a matter material to the risk. This act provides as follows:
>
> "Whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relates to some matter material to the risk."

The test of materiality must be sought at the time the question is asked, and the truth of the answer is warranted by the insured. It is from the point of view of the insurer at that time, that the materiality of the answer or statement of the applicant must be judged, and common sense and experience in the conduct of men in the ordinary affairs of life preclude even the suggestion, that the fact that the applicant had previously had a serious illness, was not material to the risk about to be assumed.

In Penn Mut. Life Ins. Co. *v.* Mechanics' Savings Bank, 72 Fed. 413, 428; 19 C. C. A. 286, 302; 38 L. R. A. 33, Judge Taft, speaking for the Court of Appeals, said:

"Materiality of a fact in insurance law is subjective. It concerns rather the impression which the fact claimed to be material would reasonably and naturally convey to the insurer's mind before the event and at the time the insurance is effected, than the subsequent actual causal connection beween the fact or the possible cause it evidences, and the event. Thus it is by no means conclusive upon the question of materiality of a fact that it was actually one link in a chain of causes leading to the event. Watson *v.* Mainwaring, 4 Taunt, 763; Jones *v.* Insurance Co., 3 C. B. (N. S.) 65; Rose *v.* Insurance Co., 2 Ire. 206; Insurance Co. *v.* Schultz, 73 Ill. 586. **And on the other hand it does not disprove that a fact may have been material to the risk because it had no actual subsequent relation to the manner in which the event insured against did occur.** A fair test of the materiality of a fact is found therefore in the answer to the question whether reasonably careful and intelligent men would have regarded the fact communicated at the time of effecting the insurance as substantially increasing the chances of the loss insured against."

We agree with the opinion expressed by the learned judge of the court below, that the

> disclosure of a serious illness is necessary and material to the investigation made by the insurer as to the nature of the risk at the time the application is made by the insured. Where, in answer to the inquiry whether he had ever had a serious illness, etc., the applicant for insurance answers in the negative, and warrants the truth of his answer; **whether the insurer would or would not have accepted the risk had the answer been otherwise, can only be a matter of conjecture, and is not relevant to the question, whether the answer and warranty related to a matter material to the risk. It was absolutely important and material that the company, about to pass upon a risk, should know of any serious illness in the past life of the applicant.**
>
> Constrained to the conclusion by the clear and uncontradicted testimony in this case, that the illness of the insured in 1901 was a serious illness, within the meaning of those words as used in the warranty, and that as such it was material to the risk, there was a breach of the warranty in question which avoided the obligation of the policy here in suit, and the jury should have been instructed on all the evidence to find for the defendant."

The Maryland Court of Appeals construing a similar Maryland statute, made a like decision in *Mutual Life Insurance Company* vs. *Mullan*, *(1908) 107 Md. 457; 69 Atl. 385.*

In *Metropolitan Life Insurance Company* vs. *Brubaker*, *(1908) 78 Kas., 146, 96 Pac. 62, 63, 64-65*, the materiality of a question relating to prior consultations of physicians was considered by the Court and it said (78 Kas. at pp. 147 and 150):

> "Very often men, who are not strictly honest, seek insurance on their lives, and a life insurance company may properly be al-

lowed to take full precautions against death-bed insurance. It is entirely reasonable that such a company should ask an applicant for insurance if he has consulted a physician. The question is simple and unambiguous. It is not like questions relating to illness, which may call for the opinion and judgment of the applicant upon a debatable matter hard to decide. It involves nothing which the applicant cannot answer categorically out of his own personal knowledge. It relates to a fact which may be recollected, as well as an illness. The question is important, because, if an affirmative answer be given, the company may make an investigation and ascertain the exact truth regarding the cause for the consultation, and the state of health it revealed. It requires no argument to show that the action of the Company may well be influenced by the answer to this question. Taking therefore, even a narrow view of the right of the insurer to exercise its own judgment and stipulate as to what is material, it is entirely fair that the truthfulness of such answer should be made the subject of a warranty."

In this case in answer to questions as to illness and medical attendance, the applicant stated that a physician had attended him for smallpox three years before and made a negative answer to the question whether any other physicians had attended him and if so when and for what. On the evidence it appeared that the applicant's last answer was false. The Court held that the Company was not liable. The Court said:

"The fact of the consultation remains, and cannot be negatived by any showing whatever relating to the true state of his health."

Again in *Cobb* vs. *Covenant Mutual Benefit Association (1891), 153 Mass. 176, 178, 179; 26 N. E. 230; 10 L. R. A. 666; 26 Am. St. Rep. 619,* the Supreme Court of Massachusetts, passing upon the materiality of the question relating to consultations with physicians, said (153 Mass. at p. 178):

> "The sixth question put to the applicant in form A of the application was, 'Have you personally consulted a physician, been prescribed for, or professionally treated, within the past ten years?' To this question the insured answered, 'No,' and it has been found by the jury, upon the second issue submitted to them, that this answer was false. The plaintiff contended that such an issue should only be found against her in case the answer was intentionally false. **In our view, the insured having made the truth of his statements the basis of his contract, it was sufficient for the defendant to show that this statement was actually untrue.**
>
> While the question whether the insured had a fixed disease, and what the disease was, might be an inquiry involved in considerable embarrassment, **the question whether he had consulted a physician, or had been professionally treated by one, was simple, and one about which there could be no misunderstanding. Had it been replied to in the affirmative, the answer would have led to other inquiries.** Indeed, the question which follows, which remained unanswered, is, 'If so, give dates, and for what diseases.' It is upon the existence of this latter question that the plaintiff founds an argument that it was necessary to show that the insured had some distinct disease permanently affecting his general health before it could be said that he answered this question untruthfully. But the scope of the question cannot be thus narrowed. Even if the insured

had only visited a physician from time to time for temporary disturbances proceeding from accidental causes, the defendant had a right to know this, in order that it might make such further investigation as it deemed necessary. By answering the question in the negative, the applicant induced the defendant to refrain from doing this."

In *Lippincott* v. *Royal Arcanum* (*1899*), *64 N. J. L., 309, 310, 311; 45 Atl. 774*, the Supreme Court of New Jersey said (64 N. J. L. at p 310):

> "At the close of the testimony there was a motion on the part of the defendant to direct a verdict in its favor. The motion was refused, the case was submitted to the jury and a verdict rendered for the plaintiff. The question presented by this writ of error is whether, upon the undisputed testimony of the case, the defendant was entitled to a binding instruction to the jury. It had been proved by the defense and not controverted by the plaintiff that Lippincott, at the time of his application for insurance, was suffering from catarrh of the throat, that he was under medical treatment for that disease, and that he remained under such treatment until his death, which resulted from consumption. It had also been proved that, some months prior to the making of the application, he had undergone a surgical operation, the object of which was the removal of the sub-maxillary gland upon the left side of the jaw, the operation having been rendered necessary by the diseased conditions of the gland. No attempt was made to discredit the witness who so testified.
>
> It is contended upon the part of the defense that the warranties of the truth, both of the statements contained in the application for insurance and of the statements made to the medical examiner, are absolute;

that the statement made by the applicant that he had never suffered from catarrh, and the further statement that he had never undergone a surgical operation were, each of them, in fact false and therefore avoided in the contract of insurance, even if they were honestly made by the applicant under the belief that they were true. This is the construction put upon warranties, similar in character, by the Court of Appeals of New York in the case of Foley *v.* Royal Arcanum, 151 N. Y. 196.

The plaintiff, on the other hand, contends that the warranties under consideration were not absolute in their character but were merely that the statements referred to were true to the best of the applicant's knowledge and belief. Anders *v.* Knights of Honor, 22 Vroom, 75, is cited to support this contention.

The question argued although an interesting one, is not involved in the decision of this case, for if the decedent warranted only the honesty of his statements, the proofs showed a clear breach of that warranty. He must have known, when he declared that he had never suffered from catarrh, that this was untrue, for he was being then treated by his physician for that disease. He likewise must have known that he was making a false statement when he declared that he had never undergone a surgical operation. The unimpeached testimony in this case is conclusive upon this point, and a verdict for the plaintiff cannot be supported without disregarding it. This being so, it was the duty of the trial court to control the jury in its action and direct a verdict for the defendant. Baldwin *v.* Shannon, 14 Vroom 596; Crue *v.* Caldwell, 23 *Id.* 215; Haines *v.* Merrill, Trust Co., 27 *Id.* 312."

In *Farrell* v. *Security Mutual Life Ins. Co. (1903), 125 Fed. 684; 60 C. C. A. 374;*

> In this case the policy was defended upon the ground that the insured was asked if he had ever been "an inmate of any infirmary, sanitarium, institution, asylum or hospital" and he answered No. It appeared that he had been treated at a hospiptal for a short time prior to the time he applied for insurance although the physician who treated him stated that he sent the applicant to the hospital more because of the environment and the care he would get than because he was really ill and the Circuit Court of Appeals of the Second Circuit held that there could be no recovery on the policy, that the answer was palpably untrue and that as the trial court had directed a verdict in favor of the company, the judgment was affirmed.

Also see:

Mutual Life Insurance Company *v.* Powell (1914), 217 Fed. 565; 133 C. C. A. 417.

Equitable L. A. S. *v.* Keiper (1908), 165 Fed. 595, 600-602; 91 C. C. A. 433.

Life Association *v.* Edwards (1908), 159 Fed. 53; 86 C. C. A. 243.

Hubbard *v.* M. R. F. L. A. (1900), 100 Fed. 719; 40 C. C. A. 665.

Insurance Company *v.* Sladden (1898), 86 Fed. 102; 29 C. C. A. 596.

Brady *v.* U. L. I. A. (1894), 60 Fed. 727; 9 C. C. A. 252.

Butler *v.* Mich. M. L. I. Co. (1906), 184 N. Y. 537.

Foley *v.* Royal Arcanum (1896), 151 N. Y. 196.

McCollum *v.* Mutual L. I. Co. (1889), 55 Hun 103; 124 N. Y. 642.

Foote *v.* Ins. Co. (1875), 61 N. Y. 571.
Smith *v.* A. L. I. Co. (1872), 49 N. Y. 211.
Hoffman *v.* Met. L. I. Co. (1910), 141 App. Div. 713.
Dentz *v.* O'Neil (1881), 25 Hun 442.
Kasprzyk *v.* Met. L. I. Co. (1913), 79 Misc. 263.
M. R. F. L. Co. *v.* Cotter (1904), 72 Ark. 620; 83 S. W. 321.
Crosse *v.* K. N. (1912), 254 Ill. 80; 98 N. E. 261.
Royal Neighbors *v.* Spoore (1914), 160 Ky. 572; 169 S. W. 984.
Met. L. I. Co. *v.* Schmidt (1906, Ky.), 93 S. W. 1055.
Aloe *v.* Ins. Co. (1899), 147 Mo. 561; 49 S. W. 553.
Dwyer *v.* Mutual L. I. Co. (1904), 72 N. H. 572; 58 Atl. 502.
Brunjes *v.* Met. L. I. Co. (1912), 83 N. J. L. 296; 84 Atl. 1062.
Bryant *v.* Ins. Co. (1908), 147 N. C. 18; 60 S. E. 983.
Van Woert *v.* M. W. (1915), 29 N. D. 441; 151 N. W. 224.
Beard *v.* Ins. Co. (1909), 53 Ore. 102; 99 Pac. 83.
Smith *v.* M. W. (1900), 196 Pa. St. 314; 46 Atl. 426.
Ins. Co. *v.* Mengal (1896), 176 Pa. St. 280; 35 Atl. 197.
F. M. L. A. *v.* Harris (1900), 94 Tex. 25; 57 S. W. 635.

The application to the Prudential Insurance Company.

In the first part of the application signed by Wiggins under the number 22, the following statement was made (Rec. p. 15):

> "22. I have never made an application for life insurance to any company or association upon which a policy has not been issued on the plan and premium rate originally applied for, except as to the following companies or associations: None, and no such application is now pending or awaiting decision".

Again, in the Medical Examiner's Report the following question and answer appear (Rec. pp. 17, 174, 177):

> "16. Have you ever been examined for a policy in any company or association which was not issued as applied for? No."

November 3, 1908, Wiggins applied to the Prudential Insurance Company for insurance in the sum of $40,000 (Rec. p. 110).

Dr. McLeod, called as a witness by the plaintiff, testified (Rec. p. 100) that on the 4th day of November, 1908, he, as a medical examiner for the Prudential Insurance Company, made an examination of Cilbey L. Wiggins at his office at Pine Barren, Florida.

Dr. Kilpatrick testified that in the month of November, 1908, he signed a medical examiner's report on an application made by Cilbey L. Wiggins to the Prudential Insurance Company (Rec. p. 92).

No policy of insurance was issued by the Prudential Insurance Company upon this application. The application was withdrawn.

December 15, 1908, the date of the applications in suit, Wiggins applied to the petitioner for $30,000 of insurance and suppressed the fact that he had applied to the Prudential and had withdrawn his application, and suppressed the fact that he had been examined for a policy in the Prudential and the policy had not been issued.

Hogue, called as a witness by the plaintiff, admitted that the application to the Prudential, his own company, had been withdrawn (Rec. p. 134). Hogue knew the application had been withdrawn previous to the time he took Wiggins' application for insurance in the Mutual Life (Rec. p. 135). Wiggins must have known that the Prudential had declined to issue a policy because the application was withdrawn and must have been withdrawn by him, as there is no evidence that anyone else withdrew it by Wiggins' authority.

Wiggins, therefore, made a false and untrue statement with reference to a matter material to the risk.

The Circuit Court of Appeals said (Rec. p. 160):

> "So with regard to the representation of the insured that there had been no previous application for insurance made by him and rejected or not favorably passed upon by the insurance company. This was untrue, must have been known to have been untrue by the insured when he made it, and it was material."

In Aetna Life Insurance Company *v.* Moore, 231 U. S. 543, and Prudential Insurance Company *v.* Moore, 231 U. S. 560, a question substantially similar in form was asked the applicant and he replied, as Wiggins did, that there was no appli-

cation to insure his life made to any company that was pending or that had not been granted.

This court (at page 557) said:

> "It is contended by respondent that this testimony shows that Salgue's application to the Penn Mutual was not rejected but was withdrawn; and, besides, whether it was rejected or withdrawn was a question for the jury. We are unable to concur with either contention. The question was a very broad one. It was whether any proposal or application had been made for which insurance had not been granted, and particulars were asked for, 'and the names of all such companies, associations or agents.' Regarding the sense of the question—indeed, if not its letter—the answer was untruthful. The question certainly called for something more than an absolute negative. Its purpose was to ascertain the conduct of Salgue with reference to life insurance in order to judge of him as a risk. If it had been answered according to the facts, the company would have received information of circumstances certainly material for it to consider."

In Prudential Insurance Company *v.* Moore, 231 U.S. 560, this court also said (at page 567):

> "The answers (relating to applications to other companies) were, therefore, not true, and we think that they were material to the risk within the meaning of the Georgia code."

The provisions of the Georgia code referred to read as follows:

> "Sec. 2480 (Sec. 2098). Any verbal or written representations of facts by the assured to induce the acceptance of the risk, if material must be true, or the policy is void."
>
> "Sec. 2481 (Sec. 2099). A failure to state

a material fact if not done fraudulently, does not avoid, but the willful concealment of such a fact, which would increase the risk, will avoid the policy".

The Georgia statute does not afford any reason for distinguishing the Moore cases from the case at bar. The Georgia statute is substantially declaratory of the common law as laid down by this court.

In the following cases it has been held that questions in relation to prior applications for insurance to other companies or associations and whether or not the same are pending or have been declined or whether insurance applied for has or has not been issued, are all as a matter of law material questions and that false answers to them avoid the policy:

Phoenix Life Ins. Co. *v.* Raddin (1887), 120 U. S. 183; 30 L. Ed. 644;

Jeffries *v.* Life Ins. Co. (1874), 89 U. S. (22 Wall.) 47; 22 L. Ed. 823;

Home Life Ins. Co. *v.* Myers (1901), 112 Fed. Rep. 846; 50 C. C. A. 544;

Security M. L. I. Co. *v.* Webb (1901), 106 Fed. Rep. 808.

Floyd *v.* Metropolitan Life Ins. Co. (1914), 90 Atl. 404;

Kelly *v.* L. I. C. Co. (1897), 113 Ala. 453; 21 So. 361;

Moore *v.* Mutual Life Assn. (1903), 133 Mich. 526; 95 N. W. 573;

Finn *v.* Metropolitan Life Ins. Co. (1904), 70 N. J. Law, 255; 57 Atl. 438;

Eddington *v.* A. L. I. Co. (1879), 77 N. Y. 564; (1885) 100 N. Y. 536;

McCollum *v.* Mutual Life (1889), 55 Hun 103; 124 N. Y. 642;
Stewart *v.* M. R. F. L. A. (1894), 78 Hun 191;
March *v.* Metropolitan Life Ins. Co. (1898), 186 Pa. St. 629;
Mutual Life Ins. Co. *v.* Nichols (1894), 24 S. W. 910;
Life Ins. Co. *v.* Judge (1899), 191 Pa. St. 484;
Myers-Broom *v.* P. M. L. I. Co. (1899), 189 Pa. St. 579;
Hardy *v.* P. M. L. I. Co. (1914), 167 N. C. 22; 83 S. E. 5.

(C) The undisputed evidence establishes that Wiggins knowingly made false and untrue statements and answers in his application respecting matters material to the risk and they were therefore fraudulently made.

There would seem to be no question on the evidence that the answers in the medical examiners' reports of Drs. Kilpatrick and Turberville in regard to prior illnesses, consultation by physicians, treatment at sanitariums and application and examination for life insurance in other companies, were false and untrue **and that Wiggins must have known they were false and untrue.** The replication which the respondents filed in the courts below, by way of avoidance of the petitioner's pleas, alleging that the petitioner had knowledge of the matters and was thereby estopped to assert a defence based upon them, is a virtual concession that there is no dispute in point of fact in regard to the falsity of the answers. (Rec. pages 60-69).

The Circuit Court of Appeals in the course of its opinion, in discussing the simulated examination certified by Dr. Turberville, said (Rec., p. 160):

> "In truth, there was no such examination had, and the insured must have known that there was none, and the representation that there had been one was a material one. So with regard to the representation of the insured that there had been no previous application for insurance made by him and rejected or not passed upon favorably by the insurance company. **This was untrue, must have been known to have been untrue by the insured when he made it, and it was material.**"

and further the Court said (Rec., p. 166):

> "Finally, does the record show that the agents and examiners of defendant had knowledge at the time the policies were written of the falsity of the representations relied upon by defendant to avoid the policies? Both Torrey and Hogue knew of the insured's previous application to The Prudential Insurance Company, and of its result. Kilpatrick also knew of the history of insured's impacted or inverted tooth and of the operation that removed it. Hogue knew that Turberville had made no examination of insured and that Kilpatrick had made but a partial one. There is evidence from which the jury might have inferred that Hogue deceived the insured and the examiners as to what was required, and that there was no collusion between the insured and himself to falsely report the examination of the doctors."

The evidence in relation to Wiggins' consultation with Dr. Dey, Dr. Dey's advice, the recommendation to have an operation, the performance

of the operation by Dr. Thigpen assisted by Dr. Watkins and Dr. Dey is not disputed. The respondents called J. C. Hogue in an attempt to prove an estoppel and Hogue testified to all of these matters. (Rec. pages 132-133-134-135-136.)

Hogue was a very willing witness for the respondent on this as on all other subjects. The attempt on the part of the respondents to establish an estoppel by not only proving the facts but attempting to prove that the defendant through its agent had knowledge of them, *took from the jury* any question as to whether or not those things had actually occurred. Hence, there was no question to submit to the jury as to whether or not any of those matters had actually occurred.

Wiggins intended to deceive the Insurance Company.

Studwell v. Mutual Benefit Life Assn., 61 N. Y. Super. (29 J. & S.) 287; affd. without opinion (1893), 139 N. Y. 615; 35 N. E. 204:

In this case the applicant was interrogated as to insurance in other companies and failed to state two policies which he carried in another insurance company. The complaint was dismissed on the trial for the suppression of these material facts. The Superior Court, in its opinion, held that the defendant was entitled to dismissal as a matter of right. The court held that the concealment was in reference to a material fact, that the applicant must have known of their existence and that the court would presume that the applicant intended to deceive the insurance company.

Northwestern Life Ins. Co. v. Montgomery (1902), 116 Ga. 799:

In this case the insured concealed certain illnesses and the names of certain physicians whom he had consulted. He died after the policy had been in force three years. The policy contained a clause making it incontestable after three years except in case of actual fraud. The insured died insane. An action was brought on the policy and a verdict found in favor of the plaintiff. The defendant showed that the applicant had concealed a serious illness and treatment by a physician. The Georgia Supreme Court, in reversing the judgment in favor of the plaintiff, at page 809 said:

> "The applicant for insurance made in his application a false statement with reference to a material matter of fact; this statement was false within his knowledge; it was made with a view to procuring the insurance, was made deliberately and with an agreement that it should be regarded as a warranty and as a part of the consideration of the contract of insurance; the company had no notice of its falsity, and acted upon it to its injury. **Purposely misstating this material fact in order to induce the Company relying upon it to enter into a contract which might prejudice its rights would be consistent with no other intention than one to deceive the company. The intention to deceive, coupled with the other facts in the case, conclusively showed fraud in the legal acceptation of the term. What the applicant thought or intended with reference to the consequences of his falsehood cannot be material. He is presumed to have intended the natural consequence of what he purposely and knowingly did.** We are therefore of opinion that the company completely made out its defense, and that the evidence of

> the plaintiffs was insufficient to overcome it. We are also of opinion that the court erred, under the evidence adduced, in leaving the jury free to find that there was no bad faith or intent to deceive on the part of the insured and that a verdict for the plaintiffs would be authorized."

Williams v. St. Louis Life Ins. Co. (1902), 97 Mo. App. 449:

The defense in this case was a concealment by plaintiff of insurance in another company. An attempt was made to avoid the defense by evidence tending to show that the insured might not have known that a policy had been issued and the Missouri Appeals Court said that the applicant had signed the application and submitted to the examination in order to procure the insurance and must have known that a policy had been issued, "and it must be conclusively presumed that she knew, when she made answer to the question directed to her for the purpose of eliciting the truth as to whether or not she had any other insurance that her answer was untrue."

It may be claimed that Wiggins signed all the usual blanks and conformed to the regulations of the company, but even that does not excuse the fraud.

A similar claim was made in *Graffan* v. *Burgess (1885), 117 U. S. 180* and this court said in respect of such claim (at p. 186):

> "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more par-

ticular the parties to it often are to proceed according to the strictest forms of law."

At the close of the trial and before the case was submitted to the jury, the insurance company made a motion for a direction of a verdict in its favor (Rec., pages 100, 75). The motion was denied. The motion should have been granted.

In Empire State Cattle Co. *v.* Atchison Ry. Co. (1907), 210 U. S. page 1, it was held that a verdict must be directed in favor of a party when the evidence is undisputed or of such a conclusive character that it would be the duty of the court to set aside the verdict if returned in favor of the opposing party.

POINT II.

The knowledge of Hogue, Torrey and Doctors Turberville and Kilpatrick should not be imputed to the Petitioner Insurance Company.

(A) Their knowledge cannot be imputed to the Company because it was obtained while engaged in a perpetrating fraud upon the petitioner.

(B) Their knowledge cannot be imputed to the petitioner for the purpose of establishing an estoppel or waiver.

(C) Their knowledge cannot be imputed to the petitioner because of the Florida statute defining "agent".

(D) Hogue was Wiggins broker and Hogue's knowledge cannot be imputed to the petitioner.

(E) This case cannot be distinguished from the decisions of this Court in the Moore cases (231 U. S. 543, 560).

(A) (1) Knowledge of an agent will not be imputed to his principal where the third party and agent are committing a fraud upon the principal.

We have been unable to find any decision in a life insurance case in the state of Florida in which the Supreme Court of that state has specifically enunciated any definite rule as to the extent the knowledge of a life insurance agent may be imputed to the company, his principal.

The Florida Supreme Court, however, has recognized the rule that the knowledge of the agent will not be imputed to his company where there has been fraud on the part of the insured.

In *Eagle Fire Ins. Co.* v. *Weelan & Co.* (*1908*), *56 Fla. 246*, the court in its opinion (p. 251) said:

> "Knowledge of an agent of an insurance company as to matters within the general scope of his authority is the knowledge of the company and **it is bound thereby in the absence of fraud on the part of the insured.**"

In *Florida Life Insurance Company* v. *Dillon (1912), 63 Fla. 140* (at p. 150) the Supreme Court said:

> "We would also call attention to the fact that the defendant company did not rely solely upon the answers to the questions contained in the application of the insured, but

also upon the report of its own medical examiner, which is attached to the pleas as an exhibit. **No fraud is alleged as to such report or that there was any collusion between such medical examiner and the insured."**

In *Maier* v. *Fidelity Mutual* (*1897*), *78 Fed. 566*, an applicant for insurance on his life signed the application in blank. The soliciting agent wrote false answers in the application, concerning the applicant's health and habits. In an action to recover upon the policy, the trial court directed a verdict for the insurance company. The Circuit Court of Appeals in affirming the judgment (Mr. Justice Harlan of the Supreme Court, writing the opinion), said:

"But it is contended by the plaintiff that the falsity of these statements cannot be attributed to the assured, so as to render the policy void, because the answers to the questions propounded to him were in fact prepared by the agent of the insurance company, and that the company is estopped to deny the validity of the policy, upon the grounds stated, if its agent knew the facts and suppressed them when preparing the answers, or failed fraudulently or negligently, having an opportunity to do so, to bring out the facts called for by the questions embodied in the application.

We cannot accept this view of the contract between the parties. **If the assured authorised the soliciting agent to prepare his answers to the questions propounded, and thereafter signed the application so prepared, neither he nor any one claiming the benefit of the policy ought to be heard to say that he did not read the answers, or know their contents before signing the application. His attestation of the application by his signature was a representation to the com-**

pany that the answers were true; for, by the terms of his application, he stipulated that the statements made in answer to questions 'by whomsoever written,' were material to the risk, and warranted to be true, and, if any concealments or untrue statements or answers were made, the policy, as well as the contract evidenced by it, should be ipso facto null and void. And when the accused accepted a policy declaring upon its face that it was issued in consideration of the application made part of the policy, and subject to the conditions indorsed on the policy, the contract became complete, and its terms are to be respected, and cannot, in an action on the policy, be ignored or made of no effect. It is an essential fact in the case that in the body of the contract evidenced by the policy are found recitals which make the application, as well as the conditions indorsed on the policy, part of the contract of insurance.

It was said in argument that the company should not be permitted to take advantage of the misconduct or wrong of its own agent. But the law did not prohibit the company from taking such precautions as were reasonable and necessary to protect itself against the frauds or negligence of its agents. If the printed application used by it had not informed the applicant that he was to be responsible for the truth of his answers to questions, and if the want of truth in such answers were wholly due to the negligence, ignorance, or fraud of the soliciting agent, a different question would be presented. But here the accused was distinctly notified by the application that he was to be held as warranting the truth of his statement, 'by whomsoever written'. Such was the contract between the parties, and there is no reason in law or in public policy why its terms should not be respected and enforced in an action on the written contract."

In *United States Life Insurance Co.* v. *Smith, (1899), 92 Fed. 503; 34 C. C. A. 506,* the insured concealed the fact that he had applied for insurance and been rejected by three other insurance companies. The plaintiff sought to avoid the misrepresentation by showing that the fact of the rejection had been communicated to the soliciting agent and suppressed by his advice. The application was in two parts, Form A and Form B. Form A was signed in the presence of the soliciting agent and witnessed by him and Form B was signed in the presence of the Company's medical examiner. The question in regard to insurance was contained in Form B. The Circuit Court of Appeals of the Sixth Circuit, Judge Lurton writing the opinion held that the insurance company was entitled to a direction of a verdict and in the course of the opinion the court said:

> **"The argument that the company should not be permitted to take advantage of the misconduct, wrong, or ignorance of its own agent has little force upon the facts of this case. It is not possible to believe that the insured was honestly misled by the self-serving suggestion of an unfaithful agent. The menace and peril of the business of life insurance lies in the interest given to agents to deceive both the insured and their companies, by making their compensation depend upon the success of applications secured by them. This was the trouble with Duffey. Unless he could succeed in suppressing the fact that this applicant had been three times rejected as a bad risk, he had no hope of seeing this application go through, or of earning his commission. Smith must have realized that his own record in this respect was a bad one, and was doubtless ready to lend an easy ear to any interpretation**

of this ominous question which threatened to defeat his purposes. . . . . .

"Smith knew that this written application would constitute the basis of the proposed contract. Yet he was willing to accept the fraudulent suggestion of an unfaithful agent, by which a most pregnant fact was to be withheld from the knowledge of the company. Through the suppression of this fact, Smith obtained his policy, and Duffey his commission. The company was thus imposed upon, and induced to make a contract which in all human probability it would not have made if this history had not been suppressed. The facts bring the case fully within the spirit and letter of Insurance Co. v. Fletcher, 117 U. S. 519; 6 Sup. Ct. 837; and Maier v. Association, 47 U. S. App. 322; 24 C. C. A.239; and 78 Fed. 566. The meaning and interpretation of this question were for the court."

In *Amer. Nat. Bk.* v. *Miller, (1911) 185 Fed. 338*, the president of the Macon Bank, being largely indebted to it on account of clearing house balances against a private bank, which he owned, and having a credit in defendant bank amounting to more than $3,000, drew a check on defendant in favor of the M. bank for $3,000, which, with certain other items, was received and accepted toward such clearing house transactions. At the time of executing the check, the president was hopelessly insolvent and knew it, and on the second succeeding day both the private bank and the M. Bank failed. In the meantime the check had been deposited in defendant bank to the credit of the M. Bank, defendant having no knowledge of the president's insolvency or the failure of the banks and the proceeds credited to the M. Bank and charged to the individual account of the president.

The Court (at page 343) said:

> "This brings us to the question whether the Macon National Bank was bound by Plant's knowledge of his own insolvency and of his indebtedness to the defendant bank. It is the general rule that the principal is held to know all that his agent knows in any transaction in which the agent acts for him. As said by Judge Taft, speaking for this court in Thomson-Houston Elec. Co. *v.* Capitol Elec. Co., 65 Fed., at page 343, 12 C. C. A., at page 645:
>
> > "This rule is said to be 'based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject matter of negotiations, and the presumption that he will perform that duty.' "
>
> "To this general rule there are exceptions, among others, that the agent's knowledge is not that of the principal when the former is engaged in an attempt to defraud the latter. Thomson-Houston Elec. Co. *v.* Capitol Elec. Co., *supra;* Niblack *v.* Cosler (Sixth Circuit) 80 Fed. 596, 600, 26 C. C. A. 16; Yeiser *v.* United States Board & Paper Co. (Sixth Circuit) 107 Fed. 340, 345, 46 C. C. A. 567, 52 L. R. A. 724. Nor is the agent's knowledge that of the principal when the interest or conduct of the agent is such as to make it certain he would not disclose his knowledge to his principal. Bank of Overton *v.* Thompson (Eighth Circuit) 118 Fed. 798, 800, 801, 56 C. C. A. 554, and cases there cited. In accordance with this principle, the knowledge of the agent is not imputable to the principal where the agent is acting for himself in his own interest, adversely to his principal, because: First, in such case, he would naturally act for himself rather than for his principal; and, second, he would not be likely

to communicate to his principal a fact which he is interested in concealing. Union Central Life Ins. Co. *v.* Robinson, (Fifth Circuit) 148 Fed. 358, 360, 78 C. C. A. 268, 8 L. R. A. (N. S.) 883. The interest of one dealing with the principal on his own business is adverse to the interest of the principal, and the presumption in such case is that he will not disclose anything detrimental to his own interest Levy & Cohn Mule Co. *v.* Kauffman (Fifth Circuit) 114 Fed. 170, 176, 177, 52 C. C. A. 126. Therefore if the transaction is partly for the benefit of the agent although the latter is representing, but not exclusively, the principal, there is no presumption that his information derogatory to his own right to transact such business will be communicated to his principal. Louisville Trust Co. *v.* Louisville, N. A. & C. R. Co. (Sixth Circuit) 75 Fed. 433, 469, 22 C. C. A. 378; Levy & Cohn Mule Co. *v.* Kauffman, *supra;* First Nat. Bank *v.* Tompkins (Fifth Circuit) 57 Fed. 20, 6 C. C. A. 237."

The judgment was affirmed in 229 U. S. 517.

In the following cases the same rule was declared:

Thomson-Houston Co. *v.* Capitol Co. (1894), 65 Fed. 341.

Louisville Trust Co. *v.* L. N. A. & C. R. R. (1896), 75 Fed. 433, 469.

Lindsey *v.* Lambert Bldg. Assn.. (1880) 4 Fed. 48.

Iverson *vs.* Metropolitan Life Ins. Co., (1907) 151 Cal. 746; 91 Pac. 609.

Loftin *v.* Great Southern Home Benevolent Ass'n, 70 S. E. 353 (1910) 9 Ga. App., page 121.

Forwood *v.* Prudential Ins. Co., (1912) 117 Md. 254; 83 Atl. 169.

Bonewell *v.* Accident Insurance Co., (1910) 160 Mich. 137.

Sprinkle *v.* Knights Templar, (1899) 124 N. C. 405; 32 S. E. 734.

Burruss *v.* National Life Assn. of Hartford, Conn., (1890) 96 Va. 543.

Elliott *vs.* Knights of The Modern Maccabees, (1907) 46 Wash. 320; 89 Pac. 929.

Wilhelm *v.* Columbian Knights, (1912) 149 Wis. 585.

(A) (2) The defendant did not ratify the acts of Torrey, Hogue or the Medical Examiners, Turberville and Kilpatrick.

In *Oxford Lake Line* v. *First National Bank of Pensacola, (1898) 40 Fla., 349,* the Court (at page 359) said:

> **"Generally speaking it does not devolve upon the principal to make enquiries as to the facts. He has a right to presume that his agent has followed instructions, and has not exceeded his authority. Whenever he is sought to be held liable on the ground of ratification, either express or implied, it must be shown that he ratified upon full knowledge of all material facts, or that he was wilfully ignorant; or purposely refrained from seeking information, or that he intended to adopt the unauthorized act at all events, under whatever circumstances.** Combs *v.* Scott, 12 Allen, 493; Marsh *v.* Joseph, L. R. (1897) 1 Ch. Div. 213; Phosphate of Lime Company *v.* Green, L. R. 7 C. P. 43; Mechem on Agency, §129."

Skinner Mfg. Co. v. *Douville, (1909) 57 Fla. 180.*

(B) The knowledge of Hogue, Torrey and the doctors cannot be imputed to the petitioner to establish an estoppel or waiver.

Giving to the evidence the most favorable view, the knowledge of the medical examiners and the so-called agents may be summed up as follows:

1. Dr. Turberville: There is no statement by this witness that he knew of the false statements made by Wiggins in his application for the insurance policies here sued upon. He was casually called upon to make a physical examination of Wiggins, which he states he did not make, but filled out a blank given to him by the solicitor, Hogue, as a "confirmation" of Kilpatrick's examination. (Rec. 83, 84, 85, 86.)

2. Dr. Kilpatrick: He knew of the operation in Montgomery on Wiggins. (Rec. 88.) He did not know that Wiggins suffered from indigestion, or a diseased heart. (Rec. 91.) He did not know that Wiggins had consulted Dr. Dey, or Dr. Calhoun, of Atlanta, or any physicians, within five years of the making of the application, except insofar as Wiggins had consulted him, and the referred to operation in Montgomery. He did not know that Wiggins had visited Hot Springs and entered a cure there in search of health, but had heard Wiggins say that he went there to recuperate. (Rec. 91, 92.)

3. J. C. Hogue: Hogue was the broker who solicited and procured the application for the insurance policies sued upon. In the light of the decision herein cited, Hogue's knowledge of the matters upon which we predicate our pleas is not chargeable to the company,

especially in view of the fact that he was a mere broker. His duty was entirely distinct from that of the medical examiners. But even at that he did not know of some of the matters which we allege as defenses to the suit. He did not know that Wiggins had consulted Dr. Dey or Dr. Calhoun; nor that Wiggins had been to a cure at Hot Springs, or had suffered from indigestion. (Rec. 132, 133.)

4. J. D. Torrey: Torrey was an agent of the Mutual Life Insurance Company, having his residence and place of business at Mobile, Alabama. Hogue, the solicitor, took the application to Torrey, after having obtained it in Escambia County, Florida. There appears nothing in the record to indicate that Torrey knew anything of any of the facts relied upon as defenses, except the fact that Wiggins had made application for insurance to the Prudential Insurance Company a short time prior to making application to the Mutual.

This point has been discussed in this brief at such length that the petitioner believes that a further discussion here is unnecessary, but the petitioner calls to the attention of the court the following cases:

Mutual Life Insurance Co. *vs.* Powell (1914), 217 Fed. 565;

Insurance Co. *vs.* Houpt (1901), 113 Fed. 572;

Butler *vs.* M. M. L. I. Co. (1906), 184 N. Y., 337;

Smith *vs.* A. L. I. Co. (1872), 49 N. Y., 211, at 215-216;

Flynn *vs.* E. L. A. S. (1876), 67 N. Y., 500, 503-505, 505-506;

Foote *vs.* Insurance Co. (1875), 61 N. Y., 571;

McCollum *vs.* M. L. I. Co., 55 Hun, 103, 106-108; (1891), 124 N. Y., 642;

Lewis *vs.* Insurance Co. (1873), 39 Conn. 100;

Ryan *vs.* Insurance Co. (1874), 41 Conn. 168;

Mattison *vs.* M. S. (1904), 91 Minn. 434; 98 N. W. 330;

Madsen *vs.* M. C. C. (1914), 168 Cal. 204; 142 Pac. 51;

Dimick *vs.* Co. (1903), 69 N. J. L. 384; 55 Atl., 291;

Silcox *vs.* G. F. (1910), 79 N. J. L. 502; 76 Atl., 1018.

(C) The Florida Statute.

The trial court charged the jury:

1. "If Wiggins knew they were false, and that he made them with the fraudulent purpose of obtaining the policy of insurance, then such statements would avoid the policy and would serve as a good defense by the company; provided, that the company at the time it accepted the application of the deceased as an insurance risk, had no knowledge of the falsity of the statements and representations made by Wiggins in his application for insurance." (Rec. p. 146).

2. "The knowledge of the agent of the insurance company would be knowledge of the company, and if the agent representing the company in taking the application, or the statements of the medical examiners had knowledge of the falsity of the statements, then the insurance company would be estopped from setting up such false statements

or misrepresentations of which they had knowledge before the issuance of the policy as a defense to this action." (Rec. p. 146.)

"* * * then if you find from the evidence that Turberville was such an agent of the company as to bind it by his, Turberville's knowledge, and that the defendant knew of such false certificate, in that case the defense of the defendant, based upon said alleged false representations, cannot be sustained. But if Wiggins knowingly signed the certificate in blank, which purported to contain the answers to the medical examination by Doctor Turberville and before his answers had been inserted therein, it was a material representation and binding on him, and if false, would avoid the policy, **unless the company through its medical examiner, Turberville, had knowledge that the certificate was false,** if it was signed by Wiggins in blank in collusion or under an express or tacit understanding with Turberville that Wiggins was not to make the answers, then it would be such a false representation as to avoid the policy.

"In determining whether the defendant knew the facts as stated in the last given instruction, it is not necessary that you should find that any of the chief officers of the defendant so knew. It is only necessary that you should find that an agent whose knowledge would be the knowledge of the defendant, did so know" (Rec. pp. 148-149).

The Trial Court also in concluding its charge said:

"As to the knowledge of the medical examiner which I have practically charged you under the statute laws of Florida, would be agents of the company, and any fact of which they had knowledge, that fact would be imputable to the company; but the knowledge of the medical examiner under the facts

> in this case as to the facts not set forth in the medical examiner's report is not chargeable to the insurance company."

It is evident from this that the Trial Court was influenced by a statute of the State of Florida hereafter referred to, and not only was the Trial Court influenced by that statute but refrained from making any change whatever in the charge and declined to make the charges requested by the petitioner's attorney.

When the case was decided by the Circuit Court of Appeals, that court based its decision on the same statute (Rec., pp. 161, 166).

The Circuit Court of Appeals in its opinion, in discussing the pretended examination before Dr. Turberville, said:

> "In truth, there was no such examination had, and the insured must have known there was none, and the representation that there had been one was a material one. So as regards the representation of the insured that there had been no previous application for insurance made by him and rejected or not passed upon by the insurance company. This was untrue and must have been known to have been untrue by the insured when he made it, and it was material. Either of these two last representations would be sufficient to avoid the policies, unless the defendant is estopped to rely upon them, by reason of its knowledge of their falsity. *It had such knowledge, if at all, because of the knowledge of its agents and examiners who handled the matter for it.*"

The Circuit Court of Appeals then quotes the statute, being Section 2765 of the General Statutes of Florida (Rec., p. 161), and (Rec., p. 163), concludes that in view of the Florida Statute,

> "We think Torrey, the defendant's Mobile manager, Hogue, the soliciting agent, and the two medical examiners were agents of the defendant to all intents and purposes, and so, for the purpose of charging it with notice of what they knew, when the policies were written" (Rec., p. 163).

And again, at page 167, the court said:

> "Taken in connection with the entire charge, we find no error in the court's reference to Hogue, as defendant's agent, or in the statement that the agents' and examiners' knowledge was imputable to the defendant".

The Florida statute does not attempt to define an agent's powers or authority nor is it broad enough in its terms to convert either Hogue or Torrey or the medical examiners into general agents whose knowledge would be imputed to the Insurance Company. The statute was passed in 1872, included in the Revised Statutes of 1892, and amended in 1895, and included in Revised Statutes of 1906 as § 2765.

Florida Statutes and the Revisions.

Laws of 1872, Ch. 1863, § 7 reads:

> "7. Any person or firm in this State who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company or individual aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them as agent or agents of such company, or who in

any wise directly or indirectly makes or causes to be made any contract [or contracts] of insurance for or on account of such insurance company, shall be deemed to all intents and purposes an agent or agents of such company, [and shall be subject and liable to all provisions, regulations and penalties of this act."]

As included in the Revised Statutes of 1892, it reads:

"2224. *Agents.*—Any person or firm in this State who receives or receipts for any money on account of, or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company or individual aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him, or them, as agent or agents, of such company, or who in any wise, directly or indirectly, makes or causes to be made any contract of insurance for or on account of such insurance company, shall be deemed to all intents and purposes an agent or agents, of such company."

The revision of 1892 was adopted by the Legislature of 1891, Act No. 4055 of the statutes. The Revised Statutes were prepared under an act passed June 1, 1889, being chapter 3905 of the statutes of Florida.

In the revision of 1892 the only change made in the laws of 1872, chapter 1863, section 7, was to omit the words 'or contracts' where bracketed, and also the concluding part of section 7, where bracketed, reading "and shall be subject and liable to all provisions, regulations, and penalties of this act."

The Revision Commisioners omitted the phrase "and shall be subject and liable to all provisions, regulations and penalties of this Act," because in the same revision (Revised Statutes of Florida, 1892, page 807, § 2545) it was provided that any insurance agent who neglects to pay his license tax or who acts as agent for any company before it has paid the license tax payable by such company, shall be punished by imprisonment not exceeding six months or by fine not exceeding fifty dollars, and there is also a penalty imposed by the General Tax Law passed in 1891 in Florida (Laws of Florida, Chapter 4010, § 9, Paragraph 5).

The revision of 1892 was construed by the Florida Supreme Court in Mathis *v.* State, 31 Fla. 291; 12 So. 681. It was there held, that the Commissioners of Revision were not given power "to enact any new statutory law, or to revive any statute or statutes not in force at the time of the revision." It was also held that the power conferred by the Act of 1889 (Chap. 3905) did not confer "authority in the Commissioners as that of creating new laws." "The manifest purpose of the first section of this Act (1889, Chap. 3905) is that the Commissioners to be appointed by the Governor should have authority and it was made their duty to revise, simplify, arrange and consolidate the Public Statutes mentioned in the Section," etc.

In the same case it was also held that the Commissioners were authorized to submit and recommend "such omissions therein and additions thereto as in their judgment were necessary to render the revision complete and perfect as an entire system." It was held, however, that when

the Legislature adopted the recommendations of the commission, the Legislature had power thereby to enact as law any new matters that might be contained therein.

It further appears in the opinion that the Commissioners submitted to the Legislature with the printed copy of the Revised Statutes a report in which they noted changes and alterations made by them and that report is contained in the House Journal of 1891. No reference was made to this section (2224).

The general policy of the Commissioners in making the revision is indicated in the opening paragraph of the report found in the Florida House Journal, 1891, p. 635:

"TALLAHASSEE, FLA., May 14, 1891.

"Hon. F. P. FLEMING, Governor.

"Sir:

"We have the honor to report to you, for transmission to the legislature, our work as commissioners to revise the statutes. The accompanying revision has been made in contemplation of the enactment thereof, or of so much thereof as the legislature may see fit to enact, and will be of no value as a collection of the statutes without such enactment, as, in pursuance of the directions of the statute under which we were appointed to revise, simplify, arrange and consolidate the statute law, we have written, or rewritten, such portions as seemed urgently to require it. We have, however, pursued a conservative course in this direction, retaining the exact language of statutes which have become the basis of vested rights, although they might have been originally much better written otherwise. We have generally abstained from making changes in statutes concerning matters especially of public policy. * * *

As included in the Revised Statutes of 1906, Section 7 (2224), reads:

"2765 (2224.) *Agents.*—Any person or firm in this State who receives or receipts for any money on account of or for any contract of insurance made by him or them or for [any] such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent [or agents] or representative of such company, association, firm or individual, or who in anywise, directly or indirectly, makes or causes to be made any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent [or agents] or representative of such company, association, firm or individual."

In the Florida Revised Statutes of 1906, section 2224 was renumbered as section 2765. The only changes made by the revision of 1906 were to omit the bracketed word "any" in the fourth line; to add the underscored words "association, firm" in the fifth line; to omit the bracketed words "or agents" in the twelfth line, and substitute in place of those words the underscored words "or representative." In the thirteenth, seventeenth, nineteenth and twentieth lines the underscored words "association, firm or individual" were also added, and in the nineteenth line the bracketed words "or agents" were omitted and the underscored words "or representative" inserted in place thereof.

The Meaning of the Statute.

It is clear that the purpose of the Florida enactment was to bring persons or firms residing or doing business in the state of Florida on behalf of foreign companies and also the foreign insurance companies themselves, under the control and regulation of the state of Florida. This is quite evident from the language of the latter part of the section. The object of the law undoubtedly was to prevent a foreign company doing business in Florida without the authority of the state of Florida and, with that object in view, to make anyone residing in Florida and soliciting insurance there and receiving premiums for insurance and sending them outside of the state, from claiming that they were not "to all intents and purposes" agents within the state of Florida.

That section as originally enacted was amended in 1895 by Ch. 4318. That amendment took the form of an amendment of Section 2224 of the Revised Statutes of Florida, Section 2224 being the numbered section 7 of the Act of 1872, Ch. 1863, as included in the Revised Statutes of 1892. The amendment of 1895 did not in any way affect or change or amplify the scope and meaning of the original act.

Whether we construe section 7 in the light of its original enactment or as amended by the amendment of the Revised Statutes in 1895, (Acts of 1895, Ch. 4380) the result is the same. The first part of the Act of 1872, as well as the first part of the section of the Revised Statutes, creates an insurance commission and forbids any foreign insurance corporation to engage in the business of insurance in the state of Florida until it has first

been authorized by the state of Florida to transact business therein. Power is then given to the insurance commission to issue a certificate of authority, upon certain conditions being complied with and to revoke it for proper cause. The companies are required annually to file a statement showing their condition so that the state of Florida may determine whether or not they are financially responsible and able to carry out their contracts and then comes section 7, in regard to agents, which is merely supplementary to all that has gone before and defines "agent" to make the statute effective.

It was not the purpose or intent of the act to change the law of principal and agent, nor to alter the usual rules governing the rights of principal and agent or deprive the principal of any defense that would be available to any other principal than a life or fire insurance company. It certainly was not the intent of the law to make the principal responsible for the acts of the agent, under any and all circumstances and regardless of whether or not the agent was in fact attempting to defraud his principal and regardless of the fact that the agent with the knowledge of the third party was attempting an act which would be a fraud upon his principal.

It does not define the extent of the agent's powers or authority. It does not limit a general agent's authority nor enlarge a special agent's authority. It does not deprive a foreign insurance company of power to classify, and, prescribe the authority of each class, of its agents. It does not require the foreign company to appoint only agents with unlimited authority to bind the company by direct action or indirectly by imputation.

The liability of the company must be determined by the same rules which apply to all other principals, whether natural persons or corporations, or whether residents or non-residents who act through agents.

All that the law intends is that when a person in Florida receives an application for a policy of insurance, or receives a policy for delivery in Florida, or transmits a premium, he is an "agent," a person upon whom Florida may inflict the penalties and punishments imposed by the statute.

Nor does the act deprive a citizen or corporation of Florida of the right possessed by all its natural or artificial residents of conducting a negotiation with an insurance company, domestic or foreign, through his or its agent.

A citizen of Florida who desires to insure his life, his home, his horse or automobile, his business or pleasure boat, his employees, may of his own motion, employ an agent and empower that agent to negotiate on his behalf, for such insurance.

Every corporation which insures in a foreign company through its Florida agency, or in a domestic insurance company, must act through "agents." That is the only way a corporation can act.

And a natural person may employ an agent or broker to perform a similar service.

The law does not mean that when an insurance contract is made by or through agents, all of the agents engaged in the transaction, are the insurance company's agents, and that all the knowledge, any or all may have, shall be imputed to the insurance company issuing the policy.

If that was the law, then any person so disposed could easily defraud an insurance company by employing his own broker and imparting all the truth to him, and then sign an application which suppresses all the truth and is a falsehood from beginning to end, and hold the company to its contract because his broker was the more active participant in the transaction and knew the truth.

If that was the law it would make legal the transaction in question. Wiggins applied to the Prudential Insurance Company for life insurance and was rejected. Hogue the agent also suffered a loss because he earned no commission. Wiggins and the agent then made out an application that was untrue in its statements, caused physicians to sign and certify to examinations that were not made, and by means of those fraudulent acts procured the policies in suit. And now, the beneficiaries of that fraud ask this Court to seal the fraud with its judgment in their favor.

The statutes of the states of Massachusetts, Wisconsin, Missouri, Illinois and Texas contain provisions similar to the provisions of the Florida statute on the subject of agents.

For ease of reference the Florida statute and the statutes of the other states named are printed as an appendix to this brief. In Massachusetts and Wisconsin the wording is almost identical with the wording of the Florida statute and provides, in substance, as does the Florida statute, that the person so acting shall be held to be the agent of such foreign company "to all intents and purposes".

The Florida courts do not seem to have construed the statute of that State in any life insurance case. The statutes of Massachusetts, Wisconsin, Missouri and Texas have been construed by and the courts of those states have held that notwithstanding the provisions of the statutes, an applicant for life insurance may negotiate through a broker of his own selection and that the knowledge of the so-called broker or "agent", under such circumstances, will not be imputed to the company issuing the policy.

The decisions also hold that the purpose of the statutes was not to alter the law of principal and agent or to convert a person so defined by the statutes as "agent" into a general agent of the insurance company with unlimited powers. In fact, the courts decided that the purpose of the statutes was to make a person doing the acts specified in the statutes amenable to the penalties imposed by the statutes in the event of the so-called "agent" attempting to represent, or representing a foreign corporation which had not submitted itself to the jurisdiction of the state.

Markey *v.* M. B. I. Co. (1869), 103 Mass. 78;

Wood *v.* Firemen's Ins. Co. (1879), 126 Mass. 139;

John E. Davis Lumber Co. *v.* Hartford Fire Ins. Co. (1897), 96 Wis. 226;

Insurance Co. *v.* Walker (1901), 94 Tex. 470; 61 S. W. 705;

Mallen *v.* Life Assn. (1912), 168 Mo. App. 503; 153 S. W. 1065;

United F. I. Co. *v.* Thomas (1899), 34 C. C. A. 240; 92 Fed. 127.

(D) Hogue was Wiggins broker.

In *United Firemen's Ins. Co.* v. *Thomas, 34 C. C. A. 240; 92 Fed. 127*, certain fire insurance was solicited by Thomas through his own broker who applied to the general agents of the United Firemen's Insurance Company. The general agents divided the commission with the broker. The broker had never been and was not at the time the policy was issued, in the service of the insurance company. The policy, however, when it was issued was delivered to the broker who delivered it to the insured. It was held that the knowledge the broker had could not be imputed to the insurance company and in the course of the opinion the Circuit Court of Appeals construed a section of the Revised Statutes of the State of Illinois, which provided among other things:

> "The term 'agent' or 'agents' used in this section, shall include an acknowledged agent, surveyor, broker or any other person or persons who shall, in any manner, aid in transacting insurance business of any insurance company not incorporated by the laws of the state."

The Court construed that statute and referred to decisions of other states construing similar statutes (Massachusetts and Wisconsin) and at page 244 said:

> "It is apparent from the examination of the provisions of this chapter that the legislature of the state of Illinois is dealing with the relations which shall exist between foreign insurance companies and the authority of the state, and, as to them, declares what

shall be done by such companies before they shall be authorized to do business within the state, or to continue the business of insurance under such authorization. It provides penalties for any infraction of the law. It sought to so hedge about the transaction of the business of insurance that no foreign insurance company, by any cunning device, could overreach the statute and transact business within the state without compliance with the terms of the statute. It imposes penalties, not only upon the company which should so unlawfully transact business within the state, but, since the company was beyond the reach of its courts, like penalties were imposed upon any one within the state who should act for such company unlawfully transacting business within the state. And, that there might be no escape from compliance with the law, it was enacted that the term 'agent', as used in the section in question, should include an acknowledged agent, surveyor, broker, or other person or persons who shall in any manner aid in transacting insurance business of any insurance company not incorporated by the laws of the state. Any such person was declared to be the agent of the company with respect to the penalties declared by the statute. This was done that there might be no evasion of the statute. This view of the sense in which the term 'agent' is defined, and the purpose sought to be accomplished, throws light upon the decisions of the Supreme Court of Illinois which we are about to consider. **The statute did not undertake to say that, as between the insurer and insured, one who acts for the insured in procuring insurance should be deemed to be the agent of the insurer**.....

We have here the acknowledged fact that Prindiville was never employed by the plaintiff in error, nor authorized to act for it; that he was the agent of the insured in procuring

> the policy, and in the application which he made. If it may be said with respect to the actual delivery of the policy by him to the assuerd that he was therein the agent of the insurer, the knowledge which he had of other insurance, derived from his agency for the insured, is not chargeable to the insurer merely because the company authorized him to deliver the policy drawn in accordance with the contract made, and upon representations made by him as agent of the insured. See, also, Ostr. Ins. Sec. 40, where the statutes of the various states are reviewed" (at pages 246-247):

In *American Steam Laundry Co. vs. Hamburg Bremen Fire Ins. Co. (1908), 113 S. W. 394, 121 Tenn., 13,* the Court said (121 Tenn. at p. 23):

> "A broker who effects insurance under no employment by the insurer, but for a commission upon the premium received for such risks as he procures to be offered and the insurer chooses to accept, is not the agent of the insurer in such sense as to bind the insurer by notice to the agent. Devenes *v.* Mechanics' & Tr. Co., 83 N. Y. 168."

(E) The Circuit Court of Appeals sought to distinguish the decisions of the Supreme Court of the United States in Aetna Life Insurance Co. v. Moore, 231 U. S. 543, and Prudential Ins. Co. v. Moore, 231 U. S. 560, upon the ground, among others (as stated in the opinion of the Circuit Court of Appeals):

"The language of the policy, limiting the authority of the agent, was significantly different from that of the policies in this case."

In the Aetna and Prudential cases cited above the application, among other things, provided that the agent had no power "to bind the company by making any promise or making or receiving any presentation or information."

The distinction, however, is more apparent than real. In the case at bar the application, signed by Wiggins which constituted his offer to contract with the defendant, provided at the very beginning: **"I hereby agree that all the following statements and answers, and all those that I make to the company's medical examiner, in continuation of this application, are by me warranted to be true and are offered to the company as a consideration of the contract,"** etc. That was the proposal. It was a proposition in simple and concise terms that the application in writing thus made and signed by the applicant was the consideration of the contract and that the statements and answers were warranted to be true.

Moore Cases.
Lumber Underwriters *vs.* Rife, 237 U. S. 605.

If the statements and answers are untrue the consideration of necessity fails.

Furthermore, the policies which were issued and delivered to Wiggins provided: "This policy and the application herefor, copy of which is endorsed hereon or attached hereto, constitutes the entire contract between the parties hereto. All statements made by the insured shall, *in the ab-*

sence of fraud, be deemed representations and not warranties, and no such statement of the insured shall avoid or be used in defense of a claim under this policy unless contained in the application herefor, a copy of which is endorsed hereon or attached hereto" (pp. 9-10); and the policies also provided:

> "Agents are not authorized to modify this policy or to extend the time for paying a premium" (Rec. p. 14).

Thus, the consideration of the contract was the representations made by Wiggins and these representations he warranted to be true. These warranties are carried into and made part and parcel of the policy contracts which Wiggins knew the agent had no power to modify in any particular either before or after the issuance of the policies.

If the decision of the court below is right that there was a waiver, then the contracts were modified to the extent of eliminating entirely the applications, including the warranty provisions contained therein. If there was a waiver, then the contracts, the policies, are what they would have been had there been no written application at all and no promises or representations or warranties on the part of Wiggins. Yet the policies state that the policy and the application which is attached shall constitute the entire contract.

And as it conclusively appears from the record Wiggins never was examined by either Dr. Turberville or Dr. Kilpatrick, this waiver because of the so-called knowledge of the agents of the Insurance Company leaves nothing of the contracts but the promise on the part of the Insurance Com-

pany to pay. But this court, in the Moore cases and the later Rife case, held, as it had previously held, that the courts would enforce the contracts as made by the parties.

Judge Harlan, writing the prevailing opinion in Maier *v.* Fidelity Mutual Life Assn., 24 C. C. A. 239, 78 Fed. 566, said, in answering a similar claim of waiver:

> "It is the impression with some that the courts may, in their discretion, relieve parties from the obligations of their contracts whenever it can be seen that they have acted heedlessly or carelessly in making them; but it is too often forgotten that, in giving relief under such circumstances to one party, the courts make and enforce a contract which the other party did not make or intend to make."

And again, in Insurance Co. *v.* Fletcher, 117 U. S. 519, the Supreme Court said that it was the duty of the applicant to read the application he signs (117 U. S. 529):

> "He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity."

Another contention made in the Fletcher case was that the insured had been deceived because the agent had filled in the application with untrue statements but the policy, when issued, had a copy

of the application attached to it and the Supreme Court (at page 534) said:

> "Assuming that the answers of the insured were falsified as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that the fraud had been perpetrated, not only upon himself, but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agent and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of his statements. The consequence of that approval cannot, after his death, be avoided."

See also:

Russell *v.* Prudential Insurance Co., 176 N. Y. 178, at p. 188;

Prov. Sav. L. A. *vs.* Withers (1909), 132 Ky., 541;

New York L. I. Co. *vs.* O'Dom (1911), 100 Miss., 219; 56 So., 379;

Ijams *vs.* Prov. Sav. L. A., 185 Mo., 466.

If it be contended by the respondents that even conceding, what they must concede, that the contracts are made up of the policies and the applications attached, that as the statements in the application are to be deemed representations and not warranties and that the enforcement of the terms of the contracts does not therefore relieve the Insurance Company, we answer that as Wiggins made the false statements with knowledge of their falsity the statements are warranties (Archer *v.* Equitable Life Assurance Society of U. S. supra)

and when enforced as warranties the contracts are avoided.

Copies of the application were attached to the Wiggins policies and, as a matter of fact, in the original declaration filed by the respondents copies of the policies, together with the application, including Dr. Turberville's pretended medical examination, were attached to and made a part thereof so that it is conclusive that Wiggins knew that an application in writing was necessary. He had insurance in three other companies, namely, the Prudential Life, the Equitable Life Assurance Society of the United States and $5,000 of fraternal insurance (p. 15). He had just made an application to the Prudential for an additional $40,000 of insurance which application the Prudential declined to accept, and it is conclusive that Wiggins fully understood the necessity of the application and the necessity of truly answering all questions put to him. He knew, when he signed the two medical examiner's reports that the statements above his signature were false. The fact of his signing the medical examiner's reports and certifying that "my answers to the foregoing questions are correctly recorded by the medical examiner" was a certificate to be delivered to the petitioner that there had been an examination, that Drs. Turberville and Kilpatrick had asked him the questions in the medical examiners' reports and that they had truly and correctly recorded the answers he made, when, as a matter of fact, neither physician interrogated him and neither physician examined him.

The application of the rule that the agent's knowledge will not be imputed to his principal when the agent and the third party are attempting

or have committed a fraud on the principal, necessarily excludes any question as to the scope of the agent's authority. A general agent with plenary power may not join in a fraud on the principal.

An analysis of the cases where the courts have examined the policy or application to determine whether or not the third party had notice of the limitations on the agent's authority demonstrates them to be cases where the applicant was innocent or acted in good faith.

When a third party acts with an agent in defrauding the principal, the third party acts without reference to the agent's authority, and the fraud itself is an evasion, or a disregard of the agent's duty and implies a purpose on the third party's part to bind the principal by inducing the agent to be disloyal to his principal.

The Circuit Court of Appeals in deciding the case at bar, found a distinction in that there was no Georgia statute similar to the Florida statute with reference to agents (Rec. p. 166).

Georgia did have at the time the policies were issued to Salgue by the Aetna Life Insurance Company and the Prudential Insurance Company, a statute passed in 1887 and incorporated into the Georgia code as Section 2443 (Sec. 2054). (See Code of the State of Georgia, 1911, Vol. 1, p. 639).

The Aetna policy was issued about June, 1905 (231 U. S. 550) and the Prudential policy was issued about the same time (231 U. S. 565).

The Georgia statute reads as follows:

> § 2054. *Definition of insurance agent.* Any person who solicits in behalf of any insurance company, or agent of the same, incorporated

by the laws of this or any other State or foreign government, or who takes or transmits, other than for himself, any application for insurance or any policy of insurance to or from such company, or agent of the same, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk at any time, or receive or collect or transmit any premiums of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than for himself, or who shall examine into or adjust or aid in adjusting any loss for or in behalf of any such company, whether any of such acts shall be done at the instance or request or by the employment of such insurance company, or of, or by, any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken."

The above definition in identically the same language is found in Section 2054 of the Georgia Code of 1895 and was continued unamended in the Georgia Code of 1911.

The Circuit Court of Appeals also based its decision on the case of Continental Life Ins. Co. *v.* Chamberlain, 132 U. S. 204, but that case is clearly distinguishable. In that case the soliciting agent was actually in the employ of the Continental Life Insurance Company in charge of fourteen counties in the State of Iowa. In the case at bar Hogue was Wiggins' agent, was not in the employ of the petitioner Insurance Company and acted all

through the transaction as Wiggins' broker or agent, and never became the agent of the petitioner even within the terms of the Florida statute.

Again, in the Chamberlain case the applicant truthfully informed the life insurance company's agent that he had fraternal insurance but was induced to omit it from his application by the suggestion of the agent that that was not "insurance" within the meaning of that word as used in the application.

In the case at bar Wiggins deliberately suppressed all information about his application to the Prudential Insurance Company. He was not deceived by Torrey, the agent of the petitioner Insurance Company, because it is undisputed that Wiggins and Torrey never came in contact. It is undisputed that Wiggins conducted negotiations for this insurance through his own broker, Hogue, and that the papers were completed when they were delivered to Torrey who signed as soliciting agent. We say "completed" because the changes in the applications made by Torry related to immaterial matters.

Wiggins selected his own agent, Hogue, had his own agent, Hogue, prepare the applications, and when they were prepared as Wiggins and Hogue intended they should be prepared, then for the first time did they come in contact with the petitioner Insurance Company through its agent, Torrey. Torrey knew nothing about the suppression of the material matters relating to Wiggins' serious illness, his consultation of physicians, his treatment by physicians, the operation and subsequent treatment by Dr. Thigpen at Montgomery, Alabama (Rec. pp. 133-134).

In the Chamberlain case the agent of the Life Insurance Company misled the applicant; in the case at bar Wiggins deceived the Life Insurance Company.

POINT III.

Assignments presenting error in charge to the jury and in refusing to charge as requested by the petitioner.

The first, second, third and seventh assignments of error are as follows:

> "1. The Court erred in charging the jury in the oral charge in the following language:
>
> " 'If Wiggins knew they were false, and that he made them with the fraudulent purpose of obtaining the policy of insurance, then such statements would avoid the policy and would serve as a good defense by the company; provided that the company at the time it accepted the application of the deceased as an insurance risk, had no knowledge of the falsity of the statements and representations made by Wiggins in his application for insurance.' (Rec. p. 73.)
>
> "2. The Court erred in charging the jury in the oral charge, in the following language:
>
> " 'The law with regard to contracts of life insurance is, that the applicant, when required to state his condition, the condition of his health past and present, must state the facts as to all material inquiries truthfully and honestly. A material inquiry would be one concerning the truth of which to (it) would be important for the company to know, and

"one likely to influence its action on the application for insurance, and if the applicant answers a material question untruthfully, with a fraudulent purpose, that is, **with intent to deceive the insurance company**, such untruthful statement would avoid the policy."

" 'Under the terms of the policy in this action, it is stipulated that all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties. Therefore, in the absence of fraud, no statement made by Wiggins in the application, though untrue, to any immaterial matter, would avoid the policy, and no false statement made by him which was not material to the inquiry, that is, which did not induce the company to issue the policy, or one which Wiggins did [not?] answer **with fraudulent intent to procure the policy**, can be relied on by the company as a defense to this action Rec. p. 73).

"3. The Court erred in charging the jury in the oral charge, in the following language:

" 'But to avoid the policies on these grounds, you must find from the evidence that Wiggins made the false representations charged, **and that he made them fraudulently**; that they were material, and that there were in fact, illness, diseases of the heart, indigestion and a surgical operation, and that he had consulted physicians, and had certified that he had been examined by Dr. Turberville.' (Rec. p. 74.)

"7. The Court erred in charging the jury in the oral charge in the following language:

" 'Then, the representations made by Wiggins in his application for insurance had been rejected; or whether he had been treated in a cure, sanitarium or hospital; or whether he had undergone a surgical operation; or whether he had any illness or disease; or whether he had consulted a physician for "his health, to serve as a defense by the company to this action, **depends upon whether such statements**

were knowingly false and fraudulently made"'" (Rec. p. 74).

These instructions to the jury were erroneous in that they left to the jury the question as to whether or not the statements were false and whether or not Wiggins knowingly and fraudulently made false statements. The instructions informed the jury that it was not sufficient for the defendant to prove merely that the statements were false but that it was the duty of the defendant to prove and the jury to find that the statements not only were false but that Wiggins knew they were false **and made them with a fraudulent intent to procure a policy.** And the instructions were also erroneous in that the court left to the jury to determine whether or not the statements so made were material.

These matters have been already argued at considerable length and under the law and the facts of this case these instructions were clearly erroneous.

The undisputed evidence shows that the statements were false, and that Wiggins knew they were false. They were material, and it was upon these false statements that Wiggins induced the petitioner to issue the four policies in suit.

The fourth and fifth assignments of error are as follows:

> "4. The Court erred in charging the jury in the oral charge in the following language:
> "The contract of insurance in this case, as 'expressed by the policies, embraces the statements and representations of Wiggins, the deceased, made to the **agent,** Hoge, or to Kilpatrick, or Turberville, the medical examiners.' (Rec. p. 74.)
> "5. The Court erred in charging the jury

in the oral charge, in the following language:

"'If you find from the evidence that the statements of Wiggins in the several matters inquired about his health and operation and treatment in a sanitarium were false, and further find that the **agents**, Hogue, and Torrey, and Tuberville, knew they were false, and——.'" (Rec. p. 74.)

These assignments present error because the trial court assumed and thereby instructed the jury that Hogue was the agent of the petitioner when, as a matter of fact, he was the agent and broker of Wiggins.

(Assignment No. 4 presents matter in the charge that will be found in the record at the bottom of Rec. page 145, continuing at the top of Rec. page 146. This instruction undoubtedly led the jury to believe that everything that Wiggins might have told Hogue or Kilpatrick or Tuberville formed a part of the contract whether it was included in the application or the policy or not.

The matter presented by the 5th assignment of error will be found in the second paragraph on Rec. page 148 of the record and here, again, the court treated Hogue as an agent of the petitioner,—treated that fact as though it was conceded or, at least, not disputed.)

The sixth and eighth assignments of error are as follows:

"6. The Court erred in charging the jury in the oral charge in the following language:

"'In determining whether the defendant knew the facts stated in the last given instruction, it is not necessary that you should find that any of the chief officers of the defendant so knew. It is only necessary that you should find that an agent whose knowledge would be

the knowledge of the defendant company, did so know.' (Rec. p. 74.)

"8. The Court erred in charging the jury in the oral charge in the following language:

" 'If you find that Tuberville knew that he had not made an examination of Wiggins, or propounded any questions to him, and that Wiggins had misstated the facts when he certified that his answers were correctly recorded by the medical examiner, then if you find from the evidence that Tuberville was such agent of the defendant company as to bind it by his, Tuberville's knowledge, and that the defendant knew of such false certificate, in that case the defense of the defendant, based upon the said alleged false representation, cannot be sustained. But if Wiggins knowingly signed the certificate in blank, which purported to contain the answers to the medical examination by Dr. Tuberville and before his answers had been inserted therein, it was a material representation and binding on him, and if false, would avoid the policy, unless the company through its medical examiner, Tuberville, had knowledge that the certificate was false, if it was signed by Wiggins in blank in collusion or under an express or tacit understanding with Tuberville that Wiggins was not to make the answers, then it would be such a false representation as to avoid the policy.' " (Rec. p. 74.)

(In the charge the matter referred to in these assignments of error appears commencing with the last paragraph on page 148 and running over to and including the first paragraph on page 149.)

Here, again, the instruction was erroneous because it submitted to the jury the question as to whether or not the insurance company had knowledge of the falsity of the Tuberville report when, as a matter of fact, there is no evidence that

it had any knowledge except such as the trial court imputed to it because the trial court left it to the jury to say whether or not Tuberville was such an agent of the insurance company that his knowledge would be its knowledge. The error was repeated in the second sentence of the eighth assignment of error because the court left it to the jury to say whether or not the insurance company, through its medical examiner, Tuberville, had knowledge that the application was false, and the erroneous impression was further strengthened by the error in the foregoing charges (sixth assignment of error):

> "In determining whether the defendant knew the facts stated in the last given instruction, it is not necessary that you should find that any of the chief officers of the defendant so knew. It is only necessary that you should find that an agent whose knowledge would be the knowledge of the defendant company, did so know." (Rec. p. 74.)

Here, again, we find the error which the insurance company claims affected the entire charge of the court, namely, the assumption that Hogue and Tuberville and Kilpatrick were agents of the company and also that if the jury found they were agents, then the jury might charge the petitioner with the sum of the knowledge of all three men.

The error in this respect is emphasized when the court refused to charge, as requested by the petitioner's counsel, the matter set forth in the tenth and the succeeding assignments of error.

The trial court also erred in refusing to make the charges requested by the petitioner as set forth in the following assignments of error:

10. The Court erred in refusing to give the following instruction requested by the petitioner:

> "The evidence in this case shows that the agent Hogue, who wrote the application and solicited the insurance which was issued to Wiggins, was not a regular or general agent of the Mutual Life Insurance Company, but was only an insurance broker; hence, the Court instructs you that Hogue's knowledge of the falsity of the representations, if any, made by Wiggins, is not chargeable to the defendant company, and it is not bound by such knowledge on the part of Hogue." (Rec. p. 76).

The tenth assignment of error is based upon the refusal of the court to instruct the jury that under the evidence in this case Hogue, who took the application, was not a regular agent of the company, but was an insurance broker. We refer the court to the argument upon the above assignment of error, where the question of the agent's knowledge as affecting the principal's knowledge is discussed.

11. The Court erred in refusing to give the following instruction requested by the petitioner:

> "The Court instructs you that if you find from the evidence that the agent and medical examiners of the defendant company knew of the false representations, if any, made by Wiggins, and that they colluded with Wiggins to procure this insurance, then such 'knowledge on their part is not chargeable to the defendant company, and it is not bound thereby.'" (Rec. p. 76).

12. The Court erred in refusing to give the following instruction requested by the petitioner:

> "The Court instructs you that if you find from the evidence that the agent and medical examiners who acted for the Company in this instance knew of the falsity, if any, of the answers and representations made by Wiggins, and purposely failed to notify the company of such falsity of said answers and representations, then they become the agents of Wiggins in the perpetration of this wrong, and the defendant company is not bound by their knowledge." (Rec. p. 76).

The eleventh and twelfth assignments of error may be considered together.

When an agent goes beyond the scope of his authority and participates and assists in the making of a contract with his principal which is a fraud upon his principal, the principal is not bound.

13. The Court erred in refusing to instruct the jury as requested by the petitioner in the following requested charge:

> "The Court instructs you that the agents and medical examiners of the defendant company may have known at the time the application was made that Wiggins had been in ill health and was in ill health at the time of the making of said application, but that such knowledge of such agent and medical examiners was not binding on the defendant insurance company unless it is further shown by the evidence that said agent or medical examiners, or one of them notified the company at its home office or through a general agent, and such knowledge of said agent or medical examiners is not chargeable to the company unless it was so imparted to the company." (Rec. p. 76).

14. The Court erred in refusing to give the following instruction requested by the petitioner:

> "The Court instructs you that although the agent and medical examiners of the Mutual Life Insurance Company may have known at the time the application was made, that said Wiggins had consulted physicians, within five years next preceding the making of said application, that such knowledge of such agent or medical examiners does not bind the defendant insurance company unless it is further shown that said agent or medical examiners notified the defendant company at its home office, or otherwise, in such manner that it reached the officers at the home office, and such knowledge of said agent or medical examiners is not chargeable to the company unless information thereof was so imparted to the company." (Rec. p. 76).

The thirteenth and fourteenth assignments of error may be considered together, as these two assignments of error relate to the refusal of the court to charge the jury that the knowledge of the agent and medical examiners in this case would not be binding on the insurance company unless communicated to the principal. We call the court's attention to the argument above in regard to the knowledge of the agent being the knowledge of the principal.

In this connection let us quote from the decision in the first appeal in this case to the Circuit Court of Appeals with regard to the question of the agents and medical examiners. (See 202 Fed. 116):

> "It is said that the examiners are the agents of the insurance company, and that

their report is for the exclusive benefit of the insurance company, and that the applicant's duties are at an end when he signs the application. The information furnished in the application itself is for the exclusive benefit of the company, as much so as is that contained in the examiner's report. In each case the applicant largely supplies the information furnished. So far as the family and personal history of the applicant is concerned, the medical examiner's function is that of an amanuensis only. Nor is it correct to say that the applicant, having signed the application, has no further duty to perform. On the contrary, after the examiner completes his report, the applicant is expressly required to certify that his answers as incorporated in it by the examiner are correct."

It would seem from this language that the Court of Appeals on the first appeal indicated that the function of a medical examiner was not such as to make him an agent in the sense in which it was contended in the trial court by the respondents.

15. The Court erred in refusing to give the following instruction requested by the petitioner:

> "The Court instructs you that if you believe from the evidence that Wiggins understood that two medical examinations were required by rule of the company, and that he certified to two examinations by separate physicians, and that the answers he made to each were correctly recorded, and you find further from the evidence that such certificates or statement by said Wiggins was untrue, and in fact that he had not been examined by two separate physicians, you will find for the defendant." (Rec. p. 77.)

16. The Court erred in refusing to give the following instruction requested by the petitioner:

> "The Court instructs you that if you believe from the evidence that Wiggins certified to the defendant company that he had been examined by Dr. George C. Kilpatrick and that the said Kilpatrick had correctly recorded the answers, and that he had been examined by Dr. J. S. Tuberville, and that said Sr. [Dr.] Tuberville had correctly recorded his answers, and you find further that either one, or both, of said doctors did not make such examination, you will find for the defendant." (Rec. p. 77.)

The fifteenth and sixteenth assignments of error may be considered together, and are predicated upon the refusal of the court to charge the jury that if Wiggins understood there were two medical examinations required by rule of the company, and certified that he had been examined by two doctors when, in fact, he had not been examined at all by one of them and only partially by the other, such action on his part would be a fraud on the company.

It was contended in the first appeal that Wiggins did not make a certificate and did not certify that he had been examined by two doctors. But we again quote from the decision on the first appeal:

> "This applicant is required to certify under his signature that his answers, as the medical examiner's report state them, are correctly recorded by the examiners. In view of the language of this application, we have no difficulty in reaching the conclusion that no application could be considered as having been taken until the medical ex-

aminer's report was filled out and certified as correct by the applicant."

This will be found in 202 Fed. page 116.

It seems clear and can be assumed from known facts that Wiggins knew that the company had a rule that two medical examinations were necessary to effect this insurance. Is it possible that if Wiggins were alive he could say that he did not know that two examinations were necessary; If he attempted to say that he did not know that two examinations were necessary he would be immediately confronted by the fact that he signed two medical examiner's reports; and if he was compos mentis at the time, he must have known that there was some reason for this, some rule or usage of the company that this course was necessary, even if he had not been directly advised to that effect. It is too late now for the respondents to call upon the petitioner to prove a fact which probably would necessarily have to be proven by Wiggins himself, whose lips are now sealed in death.

It is to be presumed that a man who is able to carry $30,000 of insurance and who only a few days previous to this particular application applied for $40,000 of insurance in another company, knows enough of business methods that when he was called upon to sign two medical examiner's reports, it was not merely an empty form but was done for a purpose.

Wiggins may have been ever so virtuous and full of integrity, but when he complacently signed two medical examiners' reports stating that he had been examined by two separate physicians when, in fact, he had not been examined by one of

them at all and by the other only partially, if he did not commit a moral fraud he at least committed a legal fraud on the Insurance Company.

His estate will not be permitted to hide behind the plea of thoughtlessness or ignorance upon the part of Wiggins, for the law will not permit that to be done to defeat justice and right. Reasonable care and thoughtfulness are required from the insured, and if he negligently answers untruthfully, the policy will be avoided. False answers to questions peculiarly within the knowledge of the assured amount to a fraud, and the presumption is that the assured knew the correct answers or had sufficient knowledge upon which to base his answers.

17. The Court erred in refusing to give the following instruction requested by the petitioner:

> "The Court instructs you that the inquiry of the defendant contained in the application which Wiggins signed, with reference to the consultation of the physicians, was a material inquiry, and that if Wiggins falsely answered said inquiry, the policy is avoided and your verdict should be in favor of the defendant." (Rec. p. 77.)

18. The Court erred in refusing to give the following instruction requested by the petitioner:

> "The Court instructs you that the inquiry contained in the application and signed by Wiggins, asking him if he was in good health, was a material inquiry, and if he answered said inquiry untruthfully the policies sued upon are thereby avoided, and you should find for the defendant." (Rec. p. 77.)

The seventeenth and eighteenth assignments of error may be considered together, and are pred-

icated upon the refusal of the Court to instruct the jury that the inquiry of the insurance company contained in the application made by Wiggins with reference to the consultation of physicians was a material inquiry, and if Wiggins falsely answered said inquiry the policy would be avoided; and that an inqury regarding the question of whether or not he was in good health was also a material inquiry.

19. The Court erred in refusing to give the following instruction requested by the petitioner:

> "The Court instructs you that the inquiry contained in the application for the insurance sued upon, asking Wiggins if he had undergone any surgical operation, was a material inquiry, and if he 'answered' said inquiry falsely the policies sued upon are avoided and of no effect, and you should find for the defendant." (Rec. p. 77.)

20. The Court erred in refusing to give the following instructions requested by the petitioner:

> "The Court instructs you that the inquiry contained in the application for insurance herein sued upon, asking Wiggins if he had ever been under treatment in any asylum, cure, hospital, or sanitarium, was a material inquiry affecting the risk, and if Wiggins answered same falsely the policies sued upon are avoided and of no effect, and you should find for the defendant." (Rec. p. 77.)

21. The Court erred in refusing to give the following instructions requested by the petitioner:

> "The Court instructs you that the inquiry in the application, for this insurance, asking Wiggins if he had ever been examined for a policy in any other company or association

> which was not issued as applied for, was a material inquiry affecting the risk, and if Wiggins answered same falsely the policies are avoided and of no effect, and you should find for the defendant." (Rec. p. 78.)

The nineteenth, twentieth and twenty-first assignments of error may be considered together, and are predicated upon the refusal of the Court to instruct the jury that the inquiry contained in the application for the insurance sued upon asking Wiggins if he had undergone any surgical operation; or had been under treatment in any asylum, cure, hospital, or sanitarium; or had applied for insurance in any other company, which insurance was not issued as applied for, were material inquiries. The materiality of these inquiries will hardly be questioned. Anything that affects the risk, or the knowledge of which would lead the company to further investigate before issuing a policy, it seems to us would certainly be material.

22. The Court erred in refusing to give the following instruction requested by the petitioner:

> "The Court instructs you that if you find from the evidence that Wiggins answered falsely a material inquiry contained in the application for this insurance or made a false statement of a material matter, and you find further that he made such false answers or statements carelessly or negligently, you must find that thereby he committed a fraud on the insurance company, and the policies issued under the application are thereby 'avoided and of no effect': In other words, if you find that Wiggins was grossly careless and negligent, in that he misrepresented material matters to the company, in law such conduct will

be considered fraudulent and the policies sued on in this case are thereby avoided as above stated." (Rec. p. 78.)

The twenty-second assignment of error is predicated upon the refusal of the Court to charge the jury on behalf of the defendant company that a false statement of a material matter made by Wiggins in his application, though not intended to be fraudulently made, if made carelessly or negligently would amount to a fraud on the company. That is to say, if Wiggins was grossly careless and negligent in that he misrepresented material matters to the Company, his conduct would be considered fraudulent.

23. The Court erred in refusing to give the following instruction requested by the petitioner:

"The Court instructs you that the medical examination attached to the application is a part of the application, and that the whole application in this case became a part of the contract of insurance and was incorporated in the several policies sued upon. Therefore, you are instructed that if Wiggins received the said policies and retained the same, he is presumed to have been familiar with the terms of said policies, including the statements and answers contained in the application. And further, if you find from the evidence that he did receive said policies and retained the same, and that the application incorporated in said policies contained false answers or statements relative to material matter affecting the risk, then Wiggins is presumed to have ratified the statements and answers which were written in said application, whether they were truthful or untruthful, and if you find that they were false to material matters the plaintiffs cannot recover in this

case and your verdict must be in favor of the defendant." (Rec. p. 78.)

The twenty-third assignment of error is predicated upon the refusal of the Court to instruct the jury on behalf of the defendant company that the medical examiner's report is a part of the application and that the whole application became a part of the contract of insurance and was incorporated in the several policies sued upon, and that if Wiggins received said policies and retained the same, he is presumed to have been familiar with the terms of said policies, including the statements and answers contained in the application; or if he did so receive the policies and retain them and there were contained in such policies false answers to statements relative to material matters affecting the risks, then Wiggins is presumed to have ratified the statements and answers whether they were truthful or untruthful, and that if the jury found that they were false as to material matters, they should find for the petitioner Insurance Company.

Conclusion.

The petitioner is a life insurance corporation organized under the laws of the State of New York and doing business in many states. It is invariably required as a condition of being permitted to do business in a state to submit itself to the jurisdiction of the state and to appoint therein an agent upon whom process may be served to the end that its policyholders may have their rights adjudicated in the courts of their own state. A life insurance corporation conducting its business in that way is

compelled to depend upon numerous agents of different grades and possessing different powers.

No life insurance corporation worthy of the confidence of the public submits to laymen the power to pass upon the physical risks offered to it for insurance. A life insurance corporation must of necessity have a physical examination made of an applicant for insurance and as complete and fair an examination as possible. It is compelled to rely on the good faith of the applicant and it is compelled to rely upon the good faith of its medical examiners.

No duty rests upon a life insurance company, when it receives applications on its own forms apparently regular on their face, to conduct an independent inquiry to ascertain whether or not the applicant has acted in good faith and whether or not its agents and medical examiners have acted in good faith.

The policies of insurance issued to Wiggins are what are known as "Ordinary Life" policies and it will be noted that Exhibits A, B, C and D (Rec. pp. 8, 18, 28, 38) are each designated at the very beginning as Ordinary Life policies. The substantial features of that form of policy were fixed by Laws of the State of New York, 1906, Chap. 326, Sec. 37 (Laws of New York, 1906, Vol. 1, p. 799) and amended by Laws of New York, 1907, Chap. 714 (Laws of New York, 1907, Vol. 2, p. 1631).

The laws of the State of New York (Laws of 1906, Chap. 326, Sec. 58, Vol. 1, p. 774) also provided:

> "Every policy of insurance issued or delivered within the state on or after the first day of January, nineteen hundred and seven,

> by any life insurance corporation doing business within the state shall contain the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writings unless the same are endorsed upon or attached to the policy when issued; and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties. Any waiver of the provisions of this section shall be void."

These policy forms were adopted pursuant to a recommendation made by the committee specially authorized to investigate life insurance companies organized and doing business in the State of New York and that committee filed a report dated February 22, 1906, in which, under the sub-title "Forms of Policies," after making recommendations for a standard form of policy, the committee concluded:

> "These provisions should be supplemented by a requirement that every policy hereafter issued by any company shall contain the entire contract between the parties; and nothing shall be incorporated thereon by reference to any constitution, by-laws, rules, application or other writings unless the same is endorsed upon or attached to the policy when issued; and that all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties; any waiver of these provisions to be void."

The policies in suit were adopted by the petitioner insurance company pursuant to the provisions of that law and under the sanction of the Superintendent of Insurance of the State of New York, the law requiring his approval.

These policies, then, do not come within the general rule that where an insurance company prepares its own form of contract that the contract shall be construed most favorably to the insured and against the company.

The purpose of the law was two-fold; it was to protect an insured against provisions of statutes, constitutions, by-laws, regulations and the like of which he might have no notice but which, in time, might be used to avoid the contract; also to embody the whole contract in writing and protect the insurance company against so-called "waivers" of the provisions of the contract.

And so, in the preparation of the application which, after the enactment of such laws, would be the sole protection that a life insurance company could have against fraud and misrepresentation, the petitioner prepared a form of application which, by its terms, would constitute the written proposal for the contract and the consideration offered by the insured for the execution of the contract.

In the case at bar Wiggins made such an offer and the application provides that it shall be the consideration for the contract which Wiggins requested the petitioner to make. To permit Wiggins' estate now, suing in his name, to avoid the effect of that written proposal is to destroy the contract. It was Wiggins' duty to see that his application was correct in form and true in point of fact. It was his duty when he signed the medical examiner's reports and certified that the matters therein recorded were correctly recorded, to see to it that the reports were true in point of fact. If they were not true, he alone knew best of all in what respects they were untrue and if he chose to

permit false reports to go in as the inducing cause for the issuance of and as a consideration of the contract he proposed to make, he could not nor can his estate now complain if the court holds the contract, the execution of which was procured by a fraud, void, and returns to his estate the premiums that he paid, with interest. The petitioner was not guilty of laches in any respect nor can the respondents claim that the petitioner should have discovered the fraud in Wiggins' lifetime and avoided the policies then. Wiggins sought to avail himself of the full fruits of his fraudulent contract and neither he nor his estate have any just cause for complaint if the estate is restored by the return of the premiums and the policies declared absolutely void.

The judgments of the courts below should be reversed and the case dismissed, with costs in all the courts to the petitioner.

October Term, 1915.

EMMETT WILSON,
PHILIP D. BEALL,
Petitioner's Attorneys.

FREDERICK L. ALLEN,
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PHILIP D. BEALL,
MURRAY DOWNS,
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Appendix.

THE FLORIDA "AGENT" STATUTE AND REVISIONS.

Laws of 1872, Ch. 1863, § 7 reads:

> "7. Any person or firm in this State who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company or individual aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them as agent or agents of such company, or who in any wise directly or indirectly makes or causes to be made any contract [or contracts] of insurance for or on account of such insurance company, shall be deemed to all intents and purposes an agent or agents of such company, [and shall be subject and liable to all provisions, regulations and penalties of this act."]

As included in the Revised Statutes of 1892, it reads:

> "2224. *Agents.*—Any person or firm in this State who receives or receipts for any money on account of, or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company or individual aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him, or them, as agents or agent, of such company, or who in any wise, directly or indirectly, makes or causes to be made any

contract of insurance for or on account of such insurance company, shall be deemed to all intents and purposes an agent or agents, of such company."

As included in the Revised Statutes of 1906, Section 7 (2224), reads:

"2765 (2224.) *Agents.*—Any person or firm in this State who receives or recipts for any money on account of or for any contract of insurance made by him or them or for [any] such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent [or agents] or representative of such company, association, firm or individual, or who in anywise, directly or indirectly, makes or causes to be made any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent [or agents] or representative of such company, association, firm or individual."

Massachusetts Statute.

The Massachusetts Statute applying to foreign life insurance companies is statutes of 1861, chap. 170, sec. 1, reads as follows:

"Whoever solicits insurance on behalf of any fire or life insurance company, whether chartered in this commonwealth or elsewhere, or transmits for a person other than himself an application for insurance or a policy of insurance to or from said company, or advertises that he will receive or transmit the same, shall be held to be an agent of such company, to all intents and purposes, and,

within the meaning of the following section, unless it can be shown that he receives no commission &c."

Wisconsin Statute.

"Section 1977. Whoever solicits insurance on behalf of any insurance corporation or person desiring insurance of any kind, or transmits an application for or a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance, or collects any premium for insurance, or in any manner aids or assists in doing either or in transacting any business of like nature for any insurance corporation, or advertises to do any such thing, shall be held to be an agent of such corporation to all intents and purposes, unless it can be shown that he receives no compensation for such services." (Wis. Statutes 1898, Vol. I, page 1489).

Missouri Statute.

The Missouri Revised Statutes, 1909, Section 6938, Vol. II, page 2203 provides among other things:

"Any person who shall solicit an application for insurance upon the life of another, shall in any controversy between the assured or his beneficiary, and the company issuing any policy upon such application be regarded as the agent of the company and not the agent of the assured, etc."

Texas Statute.

Texas Laws 1879, page 32, §1; Rev. Stat. 1891, 1895, §3093:

"Be it enacted by the Legislature of the State of Texas, that any person who solicits

insurance on behalf of any insurance company, whether incorporated under the laws of this or any other State or foreign government, or who takes or transmits other than for himself any application for insurance or any policy of insurance to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk, or receive, or collect, or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than for himself, or who shall examine into or adjust or aid in adjusting any loss for or on behalf of any such insurance company, whether any of such acts shall be done at the instance or request, or by the employment of such insurance company, or of or by any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken, and as far as relates to all the liabilities, duties, requirements, and penalties set forth in this act."

Illinois Statute.

"The term 'agent' or 'agents' used in this section shall include an acknowledged agent, surveyor, broker or any other person or persons who shall, in any manner, aid in transacting the insurance business of any insurance company not incorporated by the laws of the State." (Illinois Laws, 1869, passed March 11, 1869 § 23; Rev. Stat., 1891, p. 825, Rev. Stat. 1911, p. 1353).

Office Supreme Court, U.
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JAMES D. MAHER
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No. 126

Supreme Court of the United States

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Petitioner,

against

L. HILTON-GREEN and W. A. FINLAY, JR., as Executors of the Estate of C. L. Wiggins, Deceased.

Petitioner's Reply Brief.

The petitioner received the brief of plaintiffs so late that it was impossible to make any thorough study of the brief and authorities cited, but the petitioner begs leave to call attention to certain matters in the brief of the plaintiffs.

One of the first suggestions made by the plaintiffs is that the petitioner asserted that it relied on the certificates that Wiggins was examined by both Dr. Turberville and Dr. Kilpatrick when its plea was confined to the Turberville report only.

Petitioner, however, begs leave to refer to the charge of the Court at the bottom of page 146 and top of page 147 of the record where the Trial

Court in charging the jury referred to the fact that by way of defense the petitioner claims that Wiggins had not been examined by Turberville at all and only partially by Dr. Kilpatrick.

And the petitioner in his motion for the direction of a verdict (Record, page 151) again presented this claim that Wiggins had not been examined by either Kilpatrick or Turberville.

The plaintiffs argue that since Wiggins "recovered", the illnesses, and operation, and medical treatment of necessity could not have been material and, in any event, the burden was with the petitioner to prove that it had some effect upon the constitution of Wiggins or that it probably shortened his life.

The petitioner submits upon the authorities cited in its principal brief that the question of the materiality of the misstatements is not determined by the question whether or not the applicant recovered or whether or not the illness and treatment contributed to the death, and the petitioner also submits that the fact that Wiggins apparently recovered is of no controlling force whatever because if he had not recovered he would not have been an object for life insurance a year and three months after his death.

If these matters were so immaterial as the plaintiffs contend, the question naturally arises what purpose did Wiggins have in concealing the facts about them.

It is also significant that the plaintiffs do not make any explanation of the failure of Wiggins at least to furnish the petitioner with the names of the physicians whom he consulted and who treated him.

The petitioner might have cited a very large number of authorities in addition to those referred to in its principal brief upon the proposition that the failure of an applicant for life insurance to state the names of the physicians whom he has consulted, especially within a period of five years previous to his application, constitutes a false statement in regard to a material matter.

When Wiggins suppressed those names as well as the fact of the illness and the operation and the surgical operation and medical treatment he knowingly closed a door of inquiry that he should have left open to the petitioner.

It cannot be that Wiggins regarded the condition as trivial because we know that he consulted Dr. Dey, that Dr. Dey called in Dr. Thigpen of Pensacola in consultation and after that on Dr. Dey's advice he went to the Hot Springs for treatment, we also know he consulted Dr. Calhoun of Atlanta, Georgia, that he returned again to Dr. Dey, and finally in despair, undoubtedly suffering intense pain, he was induced to submit to an exploratory operation, was operated on by Dr. Charles A. Thigpen at the Highland Park Sanitarium at Montgomery, Alabama. We know that the operation was of so serious a character that the wound alone did not heal for four weeks and Wiggins himself remained at Montgomery, Alabama, for three months under the care and supervision of the operating physician. *All of this occurred scarcely more than a year before he applied to the petitioner for insurance.*

It is impossible to believe that Wiggins could have been acting in good faith when in his application to the petitioner he referred to an attack

of pneumonia which he had had eight years previous which he characterized as "not severe" and yet refrained from referring to the illness, the operation, the hospital treatment and the subsequent medical treatment extending over a period of three months, which he had had, and from which he suffered and which he received within fifteen months previous to the time he applied to the petitioner for the insurance in question.

How could the petitioner decide upon the effect that that illness, operation and treatment might have had when all information concerning it was suppressed and not brought to the attention of the petitioner until after Wiggins was dead and buried.

It was the absolute right of the petitioner to know all these facts from Wiggins when he applied for the insurance so that it might make an intelligent estimate of the risk offered. That decides the question. The plaintiffs undoubtedly appreciate this because the plaintiffs, upon the trial of the action, produced a Dr. McLeod for no purpose whatever except in an attempt to prove that when McLeod examined Wiggins for the Prudential Insurance Company about a month or five weeks previous to the time Wiggins applied to the petitioner, he, Wiggins, in the opinion of McLeod, was an insurable risk. Without in any way criticising Dr. McLeod's opinion, the petitioner submits that it had the right to pass judgment upon this question after an actual, honest examination of Wiggins by its own physicians. It was deprived of its right to pass upon the question, whether or not Wiggins was an insurable risk, because Wiggins never presented himself to any examiner of the petitioner for examination, and be-

cause Wiggins falsely certified to the petitioner that he had been examined by the petitioner's examiners when he knew he had not been so examined, and because Wiggins knowingly suppressed the names of the physicians who had treated him for the purpose of preventing any inquiry as to his physical condition.

The plaintiffs, however, contend that the medical examiner's report is not a part of the application, and Wiggins therefore made no representation in regard to his physical condition. This argument is a confession of guilt.

The court will see from an inspection of the application itself that the paper purports to be nothing but an application for insurance. Wiggins said when he caused these papers to be presented to the petitioner:

> "I hereby agree that all the following statements and answers, and all those that I make to the Company's Medical Examiner, **in continuation of this application**, are by me warranted to be true and are offered to the Company as a consideration of the contract," &c.
>
> "I hereby certify that my answers to the foregoing questions are correctly recorded by the Medical Examiner.
>
> CILBEY L. WIGGINS,
> **Signature of the Person Examined."**

The argument of the plaintiffs is not only a frank admission that Wiggins knowingly permitted false statements to be included in his application but that he intended also to defraud the petitioner by this mental reservation as to his construction of the meaning of the word "application".

The Circuit Court of Appeals of the Fifth Circuit on the first appeal in this case, 202 Federal Reporter, at page 116, effectually disposed of this claim of the plaintiffs that the Medical Examiner's report was not part and parcel of the application.

The Boehm case (30 N. Y. Supp. 660) cited by the plaintiffs is not in point in any particular.

In the Boehm case the application was not attached to the policy nor did the policy refer to it. The policy simply stated that it was issued "upon the provisions, conditions and agreements on the back hereof which are made a part of this contract."

On the back of the policy was a provision that any breach of warranty or untrue statement "in the application for this policy" would render the contract void.

The medical examiner's report was on the back of the application and was not included in the application by a phrase such as appears in the application for the policies in suit.

The distinction between the Boehm application and the applications upon which the policies in suit were issued is pointed out in Schane *vs.* Met. Life Ins. Co., 76 App. Div. 271.

Cooley's Briefs on the Law of Insurance, Vol. 1, page 683, lays down the rule:

> "As a general rule, irrespective of the statute, the medical examination, or at least so much of it as consists of the declarations made by the insured, is considered as a part of the application."

and in addition to the cases cited by Cooley the attention of the court is directed to:

Paquette *vs.* Prudential Insurance Co. of Am., 193 Mass. 215, 79 N. E. 250;
Landeau *vs.* Ins. Co., 80 N. E. 452;
Rauen *vs.* Ins. Co., 129 Iowa, 725 at 731;
Arter *vs.* Northwestern Mutual Life Ins. Co., 130 Fed. 768;
Grevenig *vs.* Ins. Co., 112 La. 879, 36 Southern 790.

The Edington case, referred to in plaintiff's brief did not decide that a medical examiner's report formed no part of the application. The only question before the court there was whether or not, when a person filled in a blank application so far as it was possible for him to do so and then presented it to the company's medical examiner who refused to examine him at all, such act constituted an application to the insurance company for insurance, and the Court of Appeals held that it did.

"Continuation" is defined by the Century dictionary to mean

> "1. The act or fact of continuing or prolonging; . . .
> 2. Extension or carrying on to a further point; the thing continued: as, the continuation of a story."

Plaintiffs have cited two cases, one Pelican *v.* Mutual Life, 44 Mont. 277, 119 Pac. 778, and Aetna Life Ins. Co. of Hartford *v.* Outlaw, 194 Fed. 862, on the construction of the policies in suit.

Neither case is in point. In the Pelican case, Pelican informed the defendant of the name of the

only physician who had treated him within five years prior to the application and the name of the disease from which Pelican believed himself to be suffering; that is, he stated that he had been treated by a Doctor Matthews for influenza. When the action was tried the question controverted was whether or not Pelican actually had tuberculosis at the time he applied for the insurance. Dr. Matthews stated that Pelican had tuberculosis but he had not told Pelican that and treated him only twice. The mother and sister of the plaintiff, the beneficiary, however, were called as witnesses and testified that they were present when Dr. Matthews treated Pelican and that Dr. Matthews informed Pelican and his wife and sister, in their presence, that Pelican was suffering from influenza and that his condition was not serious. So that there was a controverted question of fact as to whether or not Pelican knew of the illness from which he suffered and under the circumstances the question was properly submitted to the jury.

That is entirely different from this case because in the case at bar Wiggins suppressed the fact of his illness, his operation and his hospital treatment and to make the suppression complete and to bar all possible inquiry, he even suppressed the names of Drs. Dey, Calhoun, C. H. Thigpen of Montgomery, Alabama, F. A. Thigpen of Pensacola, Florida, and D. J. L. Watkins.

The opinion in the Outlaw case is quite short but apparently there, too, there were solid questions of fact to be submitted to the jury and the discussion as to the meaning of the provision in the policy might safely be said to be purely academic because all the court decided was that a charge re-

quested by the insurance company to the effect that "a misstatement or misrepresentation in a material matter would avoid the policy, although such misstatement may have been honestly made in a sincere belief that it was correct, and without any fraudulent intent" was improper. Apparently that charge would have been equivalent to a direction of a verdict in favor of the defendant in spite of the disputed questions of fact as to whether or not the applicant had made any misstatements at all. The Circuit Court of Appeals for the Fourth Circuit in the Outlaw case said:

> "Evidence on these controverted allegations was offered by both sides, and the case went to the jury, who found a verdict for the defendant in error (plaintiff)."

The plaintiffs frankly concede that Wiggin's statement, "I have never made an application for life insurance to any company or association upon which a policy has not been issued on the plan and premium rate originally applied for, except as to the following companies or associations, None, and no such application is now pending or awaiting decision," was material but they endeavor to avoid the effect of that false answer by asserting that the petitioner had knowledge of the fact through its so-called agents. The plaintiffs admit that the statements purported to have been made by Wiggins to the medical examiners are false; admit that Dr. Turberville never examined Wiggins and that Dr. Kilpatrick did not examine Wiggins until two days after Kilpatrick and Wiggins had signed the medical examiner's report containing the false answers. The plaintiffs admit that the suppression of facts referred to above were

knowingly made by Wiggins and all of the plaintiffs' arguments and admissions lead inevitably to the only ground upon which they seriously make any stand, namely, that the petitioner should, nevertheless, be compelled to pay the amount of the policies because the so-called agents, who were the instruments of Wiggins' fraud, knew of the fraud.

The plaintiffs, at pages 49 to 52 of their brief, tacitly admit the fraud in spite of their assertion to the contrary. Wiggins, as they say, was a wealthy man, he was a man 61 years of age, the plaintiffs say in their brief he was indifferent to insurance and it was Hogue's persistence that procured the application. Plaintiffs would impute to Hogue all of the fraud. They would have us believe that Hogue not only defrauded Wiggins but Dr. Kilpatrick, Dr. Turberville and Mr. Torrey.

And yet, if Wiggins was a wealthy man, if he was indifferent, if he did not want this insurance, why did he consciously make himself a party to so deliberate a fraud? What intent could he possibly have had excepting a fraudulent intent? Hogue could not have induced Wiggins to sign the two applications in blank unless Wiggins wanted insurance. Wealthy business men, indifferent to insurance, do not sign their names to papers in blank and turn them over to insurance agents to be filled in with anything the agent sees fit to write above the signature. It is inconceivable that Wiggins signed these papers in blank and it is not only inconceivable but such an assumption is without any support in the evidence. Hogue positively testified that the first part of the application con-

taining questions 1 to 22 was filled in by Hogue himself before Wiggins signed it. What ground is there for believing that if Wiggins did not sign the first part of the application until after it was filled in completely, he nevertheless signed each paper a second time at the bottom in blank and turned it over to Hogue without knowing or caring what would be written in above it.

If Wiggins permitted the papers to go out of his hands without knowing or caring what was in them, then he of necessity endorsed any statement made above his signature and he was just as guilty of fraud as he would have been had he signed it after it was filled in, knowing that the statements contained in it were false. Insurance Co. *v.* Fletcher, 117 U. S. 519.

Neither Hogue nor Turberville nor Kilpatrick alone could have perpetrated this fraud. No matter what fraud they might have been willing to commit, the only way in which this fraud could have been successfully perpetrated was by the assistance and connivance of Wiggins. If Wiggins had refused to sign applications in blank (as plaintiffs contend he might have done); if he had refused to sign applications which he knew contained false statements, or if Wiggins had refused to certify that the two medical examiners had correctly recorded his answers in the two medical examiner's reports, this fraud never could have been perpetrated. The plaintiffs also argue that Wiggins might have relied upon the construction which Hogue placed upon the blanks but there can be no such presumption in the face of the testimony of Hogue, the plaintiff's own witness, to the contrary. If Hogue had practiced the fraud in the

manner in which the plaintiffs argue he might have committed it (Plaintiff's brief, pages 50-52) then why didn't Hogue testify to that fact upon the witness stand. How could the jury find a verdict in favor of the plaintiffs and at the same time reject Hogue's testimony. The plaintiffs used Hogue in their attempt to estop the petitioner from defending upon these policies. If the jury or the court rejects Hogue's testimony, then there is nothing in the record to support the fanciful suggestions contained on pages 48 to 52 of the plaintiff's brief.

On the contrary, Hogue testified positively that he filled in his part of the application before Wiggins signed it and that the medical examiners must have gotten their information from Wiggins (Rec., pp. 129, 131).

In attempting to distinguish the Moore cases, plaintiffs argue that this case differs from the Moore cases in that in those cases there was a limitation upon the authority of the agent.

But the plaintiffs overlook the fact that Wiggins proposed that his application should be the basis and a part of the proposed contract of insurance and a consideration for it and that all the statements made in it were by him warranted to be true. And the plaintiffs also overlook the fact that the policies in suit were issued upon those applications and nothing else and that those applications following Wiggins' proposal, were made part and parcel of the contract which the agent had no authority to modify.

The Appellate Division of the Supreme Court of the State of New York in Archer *v.* Equitable Life Assur. Soc., 169 App. Div. 43, in passing upon

a policy containing similar provisions and particularly in construing a statute of the State of New York (Insurance Law, §58, main brief, p. 103) identical in terms with the language in the policy here, said:

> "It is quite evident that the Legislature had in mind an additional purpose, which was to prevent, so far as could be, controversies which had arisen between the insurer and the insured as to the accuracy of statements made by the former at the time the policy was applied for,"

and also, toward the close of its opinion, the same court said:

> "So the legislative intent, as expressed in the section, seems to me clear. It requires insurance companies, when issuing policies, to set out therein the entire contract of insurance, and every statement or representation which induced the company to enter into the agreement, and upon which it relied in so doing, if thereafter to be available as a defense to a policy, it is to be annexed to and made a part of it. The construction thus given is fair to both parties. **Notice is thus given that the insurance company relied, in issuing the policy, upon the truth of the statements and representations made.** To hold otherwise, it seems to me, is to entirely destroy one of the purposes for which the section was enacted."

The Circuit Court of Appeals of the Fifth Circuit, however, tersely disposed of the attempted distinction of this case from the Moore cases in a recent decision (October, 1914, Mutual Life Ins. Co. *v.* Powell, 217 Fed. Rep. 565), in which case the policy was in the same form as the policy in this case and contained the identically same limitation on the agent's authority, by saying:

> "In the two Moore cases cited above the provisions of the Georgia Code were considered by the Supreme Court, and the decisions are clearly to the effect that where the statements in the application and answers to the medical examiner were false and material, if undisputed, the question of good faith was not one for the jury. It is true that the policies in the said two cases contained clauses to the effect that no statement or declaration made to any agent or examiner or other person not contained in the application could be taken or construed as having been made to or brought to the notice and knowledge of the company. While the language of the policy under consideration as contained in the clauses above quoted is somewhat different, its effect is the same. But this is immaterial, as on the undisputed facts the fraud was apparent."

Hogue was not an agent for the petitioner. He did not assume to act for the petitioner. He was acting strictly and solely for Wiggins. The Florida statute does not make his employment by Wiggins as a broker impossible in point of fact and under the authorities cited by petitioner, the Florida statute, in any event, does not make Hogue such an agent of the petitioner as to make the petitioner chargeable with his knowledge. Hogue did not sign the application—another significant fact. The petitioner had no knowledge of Hogue's part in the transaction.

The petitioner contends that the Moore cases are in point and that the petitioner has correctly cited the effect of the court's decision in each case.

There was some dispute in the Moore case over the facts. There is no dispute as to the facts in this case.

If instead of submitting this case to the jury and taking a general verdict the court had submitted specific questions, the jury would have been bound to find that Wiggins had a serious illness, that he had a surgical operation, that he was treated at a sanitarium, that he had consulted five physicians in connection with this one illness, operation and treatment within a period of two years previous to his application to this Company and that he had applied to the Prudential Insurance Company and that the policy was not issued.

And the jury would have been bound to find that Wiggins knowingly made the statements contained in the application and knew they were false. These were matters concerning which Wiggins had personal knowledge. No one could know better than Wiggins in respect of these facts. A life insurance company questioning an applicant concerning previous illnesses, operations, hospital treatment and consultation of physicians is bound to accept the statements of the applicant. The applicant offers himself for insurance and the risk is based on his physical condition. Hence, as the facts in this case are conceded there was no basis for a verdict in favor of the plaintiffs.

Germania Life v. *Klein, 137 Pacif. 74 (Colorado, 1913).*

> "The foregoing authorities, including the decisions of the highest courts of this state, we regard as conclusive on the proposition that, if representations made in answer to specific questions material to the risk are untrue, the policy will thereby be rendered void, and that it is immaterial whether such answers be considered warranties or representations, or whether they were made with intention to deceive the insurer or without such intention."

Armour et al. v. *The Transatlantic Fire Ins. Co.*, 90 N. Y. 450, 455.

Knights of Maccabees v. *Shields*, 156 Ky. 270, 276.

Upon this point we said in Masonic Life Association *v.* Robinson, 149 Ky. 80:

> "Section 639 of the Kentucky Statutes provides that: 'All statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties; nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy'.
>
> "Under this statute, we have held that a statement as to rejections by other companies is material to the risk, and if false is sufficient to avoid the policy, when it is shown by the uncontradicted evidence, as in this case, that the company would not have issued the policy had it known of the rejections, and this is so whether the insured at the time of making the application remembered or had in mind the fact of previous applications and rejections or not, and without regard to whether his answer was or not in good faith and without any intention to deceive."
>
> Carrollton & Co. *vs.* Am. C. Co., 115 Fed. 77.

The plaintiffs question the petitioner's construction of the Florida statute.

Petitioner was unable to find any decision of the Supreme Court of Florida construing the "agents" statute and apparently there is none because the plaintiffs cite none.

It cannot be that the Florida Supreme Court places on that statute the construction claimed for by the plaintiffs because there are numerous

fire insurance cases in the reports of the Florida Supreme Court where that court had occasion to construe the extent to which the knowledge of an agent was chargeable to the principal, insurance company, and in none of those cases does the Supreme Court of Florida base its decision on the Florida Statute. In all of those cases that petitioner has read the Supreme Court of Florida has construed the matter in the light of its own and the authorities of the courts of the different states as a matter of common law and not a matter of statute and the decisions that it has made were based not on the statute but on the court's view of the law of agency.

It would seem that if the statute had the controlling force that plaintiffs contends it has, then the Florida Supreme Court would have said so and thus settled the question.

The petitioners, however, claim that the statutes to which the attention of this court has been directed in its brief and the decisions referred to support the petitioner's contention, namely, that that statute does not invariably and inevitably charge a principal with knowledge of his agent's acts nor does that statute charge a life insurance company with the knowledge of a broker employed by an applicant for insurance to solicit insurance for it.

The following statute found in Florida Compiled Laws 1914 seems to indicate Florida's public policy in regard to medical examinations in the strongest possible terms.

§3380. Forging or counterfeiting doctor's certificate of examination.—Whoever falsely makes, alters, forges or counterfeits any doctor's certificate or record of examination to an application

for a policy of insurance, or knowing such doctor's certificate or record of examination to be falsely made, altered, forged or counterfeited, shall pass, utter, or publish such certificate as true, with intent to injure or defraud any person or corporation, shall be deemed guilty of forgery, and upon conviction thereof shall be punished by imprisonment in the State penitentiary not exceeding five years or by fine not exceeding five hundred dollars (Ch. 4525, Acts 1897, §1).

FREDERICK L. ALLEN,
EMMETT WILSON,
PHILIP D. BEALL,
MURRAY DOWNS,
Petitioner's Counsel.

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In the Supreme Court of the United States.

MUTUAL LIFE INSURANCE COMPANY, OF NEW YORK, PETITIONER.

versus

L. HILTON GREEN AND W. A. FINLAY, JR., AS EXECUTORS OF THE ESTATE OF C. L. WIGGINS, DECEASED, RESPONDENTS TO PETITION.

No. 126.

October Term, 1915.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

BRIEF

OF

W. A. BLOUNT, A. C. BLOUNT AND F. B. CASTER, ATTORNEYS FOR RESPONDENTS TO PETITION.

STATEMENT.

This is a suit by Respondents, (hereinafter called Plaintiffs,) to recover from Petitioner, (hereinafter called Defendant,) upon four policies of insurance upon the life of Cilbey L. Wiggins, each for the sum of Seven Thousand, Six Hundred and Sixty-Two Dollars, and each dated December 16th,

1908, and to recover attorneys' fees for plaintiffs' attorneys in the sum agreed upon by the parties hereto. (p. 83, Record.)

Upon a trial before a jury, in the United States District Court for the Northern District of Florida, at Pensacola, in which case was pending, a verdict was rendered for the plaintiffs for the amount of the policies, with interest and attorneys' fees. The defendant took a writ of error to the Circuit Court of Appeals of the Fifth Circuit, which affirmed the judgment, and a writ of certiorari has been issued to that Court by this Court.

PLEADINGS.

The Declaration is in the usual form.

The Pleas. It is unnecessary for us to follow the various theories of the pleas, because no error is assigned in connection with them, and a general statement of them will suffice.

All of them rely upon answers made by Wiggins in his application, or to the Medical Examiners of the defendant, some alleging as to each answer, that it was fraudulent, and others alleging that Wiggins knew that it was false, and material, and made it for the purpose of inducing defendant to issue the policies.

These answers and their falsity are alleged as follows:

1. That Wiggins answered to the Medical Examiners that he had had no illness except pneumonia, when, in fact, he had had indigestion, a weak and diseased heart, and had been operated upon for a cyst in the jaw-bone. (Pleas 1, 2 and 3, pp. 54-57, Record.)

2. That he answered to the Medical Examiners that he had not consulted a physician in the last five years, when he had consulted a physician within five years. (Pleas 4, 5 and 6, pp. 57 and 58, Record.)

3. That he answered to the Medical Examiners that he was in good health, when, in fact, he suffered with indigestion, had a weak and diseased heart, and had been operated upon for a cyst in the jaw-bone. (Pleas 7, 8 and 9, pp. 58 and 59, Record.)

4. That he answered to the Medical examiners that he had not undergone any surgical operation, when, in fact, he had been operated on for a cyst in the jaw-bone. (Pleas 10, 11 and 12, pp. 60 and 61, Record.)

5. That he answered to the Medical Examiners that he had not been under any treatment at an asylum, cure, hospital or sanitarium, when, in fact, he had been at a cure in Hot Springs, Arkansas, and under treatment in a hospital in Montgomery, Alabama. (Pleas 13, 14 and 15, pp. 61 and 62, Record.)

6. That in his application he stated that he had never made an application for life insurance in any Company, or Association, upon which a policy had not been issued, when, in truth, he had made application for life insurance on November 30th, 1908, to the Prudential Insurance Company, of North America, upon which no policy was issued. (Pleas 19 and 20, pp. 64 and 65, Record.)

7. That he certified, in his application, that the Medical Examiner of the defendant, J. S. Turberville, had made a separate physical examination of him, and that his answers to the said Turberville were correctly recorded by the said Turberville, when, in fact, Turberville never examined him, and did not propound questions or record the answers. (Pleas 16, 17 and 18, pp. 62-64, Record.) (A reference to these pleas will show that the contention of the petitioner that it relies upon certificates of Wiggins that both Kilpatrick and Turberville examined him, is not well founded. The pleas rely only upon an alleged false certificate that Turberville had examined him. Wiggins.)

Each of the pleas, 1, 3, 4, 6, 7, 9, 10, 12, 13, 15, 16, 18 and 20, alleges that the answers by Wiggins were fraudulently made, and all the others (except the 19th,) allege that he knew when he made the answers that they were false and material, and that he made them for the purpose of inducing the defendant to issue the policies. Of course this is equivalent to an allegation of fraud.

The 19th plea does not charge fraud, but relies upon the falsity of the statement that Wiggins had not previously applied for insurance in other companies, which had not been issued.

Even if the pleas had not alleged fraud, the defendant would, under the terms of these policies, have had to prove it, as we shall show hereafter.

The Replication. To all of these pleas, the plaintiffs replied,—

Denying the truth of each of them;

Alleging the knowledge of the defendant at and before the issuance of the policies of the truth as to the facts alleged in the pleas to have been falsely and fraudulently stated by Wiggins.

The inquiries which arose at the trial, under these pleadings, were,—

1. Whether Wiggins made, in his application, the representations alleged in the pleas;

2. a. Whether Wiggins, *before the time of* the issuance of the policies,—

Had indigestion;

Had a weak and diseased heart;

Had been operated on for a cyst in the jaw-bone;

Had consulted a physician within five years;

Had been at a cure at Hot Springs, Arkansas;

Had been treated at a hospital in Montgomery Alabama;

Had made an application to the Prudential Life Insurance Company, upon which no policy had been issued;

Had certified that he had been examined by Turberville, and that Turberville had correctly recorded his answers;

b. Whether Wiggins, *at the time of* the issuance of the policies, was not in good health, because he,

Had indigestion;

Had a weak and diseased heart;

Had had an operation for cyst in the jaw-bone, from which he had not recovered;

3. Whether, if his answers to any of the foregoing were false, they were material;

4. Whether the answers were fraudulent;

5. Whether the defendant, at or before the issuance of the policies, knew the falsity of the answers.

ARGUMENT.

There is, as to some of these issues, absolutely no testimony, and as to others, such unsubstantial and inconclusive testimony that it may be disregarded, and we may, therefore, at the outset, eliminate them.

SOME ISSUES THAT MAY BE ELIMINATED.

Some of these are,—

That Wiggins, *at the time of* the issuance of the polices,—

Had indigestion;

Had a weak and diseased heart;

Had had an operation for cyst in the jaw-bone, *from which he had not recovered*;

There is absolutely *no evidence* that any of these things were true. There is no evidence relating to his state of health at the time of the issuance of the policies, nor is there any evidence of the existence at any time, prior to the time of his application, of any ailment which would necessarily, or even naturally, continue to exist up to the time of the application.

Upon the contrary, as to the cyst, Dr. Wm. P. Dye testified, (p. 105, Record,) that "the wound (arising from the operation for cyst,) healed freely in about four weeks." The operation took place in July, 1907, and the application was made December 15, 1908, a year and a half afterwards.

The only other witness testifying upon the subject, Dr. C. A. Thigpen, who performed the operation, said that Wiggins was only confined in the Hospital for ten days, and that he was under his (the doctor's) direct care only from July 16, 1907, to August 13, 1907, (28 days,) during which time Wiggins was at a Hotel, and was under his supervision for about three months.

All this, as we have said, took place in the summer and fall of 1907. The affirmative of showing that Wiggins had not recovered at the time of the application, more than a year afterwards, is upon the defendant, and the above evidence (which is all the evidence on the subject,) falls far short of sustaining the burden.

And, as to the "weak and diseased heart," Dr. J. C. McLeod, the only person, except Kilpatrick, who testifies as to his condition at any time near the time of the application, says, (pp. 120 and 121, Record,) that he made an examination of Wiggins on November 4, 1908, (41 days before the time of the application,) and "I did examine his heart. There were no perceptible indications of disease of his heart." "The pulse did not intermit; it was not irregular." "So far as I was able to discover, at the time I made said examination, said Wiggins was free from physical and mental defects and in good

health." And, "in my opinion he was a first-class risk for a man of his age."

Dr. G. C. Kilpatrick, the defendant's Medical Examiner, testifies, (p. 221, Record,) that day or two after the application, he examined Wiggins' heart, and that he found it "apparently sound and all right."

It is true that he died of myocarditis, which, as Dr. J. B. Elliott, Jr., testified, (p. 108, Record,) is a disease of the heart muscles; but he died fifteen months after the application was taken and the policies issued, and there is no testimony nor implication from any testimony, that the disease of the heart of which he died had existed at the time of the issuance of the policies. Upon the contrary, Elliott, who is the only man that testifies on the subject, says, (p. 108, Record,) "in this case, it is impossible for me to say how long it had been existing before my visit." And, "to the best of my recollection, the patient had only been sick three months, judging by the history given me."

Others to be eliminated are,—

That Wiggins, *before the time* of the policies,—

Had indigestion;

Had a weak and diseased heart.

As to these, the evidence is so unsubstantial and inconclusive as scarcely to be worthy of comment. It consists *solely* of the testimony of J. M. Dannelly, who says, (p. 102, Record,) that he visited Wiggins several times, when Wiggins was in his room at the hotel in Montgomery, in July, 1907, under treatment by Dr. Thigpen, (for an operation on his tooth or jaw-bone,) and Wiggins "stated that he was unwell at that time," and " said that he was suffering from dyspepsia, and feared his heart was not sound."

Of course the presence in Wiggins of a fear that his heart was not sound, is no evidence that it was unsound.

As to the dyspepsia, it suffices to say that the charge in the plea is that he had "indigestion," and that dyspepsia is not necessarily indigestion, and to say further, that the representation in the Medical Examiner's report relied upon is that he had had no "illness," and that he was in "good health," and that the presence of dyspepsia is not necessarily either an illness or an absence of good health. In fact, there is nothing more loose and uncertain than the use by laymen of the word dyspepsia, they frequently meaning merely a heartburn, or other incident of transitory failure to digest. However, what ever may have been the meaning attached to it by Wiggins, there is a failure on the part of the defendant to show that it was other than a temporary indisposition, and that it was one which would have an effect upon his health or longevity, as to which we will say more further on in this brief.

There are other vital objections in law to these being available as a bar to recovery, which objections as applied to other phases of the case, we will discuss later, but we deem it best to eliminate these in the beginning, because there is no evidence in any view of the law to sustain them. If the Court differs with us as to this, it will find, we think, in our subsequent discussion of the law, principles which will show that these things cannot defeat the plaintiffs' right to a judgment.

As to the other defenses:—

Wiggins made no representations available to the defendant as a defense, except as to his previous application for insurance in the Prudential Life Insurance Company.

The representation that he had not made application to any other insurance company, upon which no policy had

been issued, is found in the *application* for the policy. All other representations are found in the *Medical Examiner's reports.*

The policy, however, expressly declares "no such statement of the insured shall avoid or be used in defense to a claim under this policy, unless contained in the written application hereof, a copy of which is indorsed hereon, or attached hereto." (p. 10, Record.)

If the Medical Examiner's Report is a part of the application, then all of the representations relied upon by the defendant, made by Wiggins, are, if the necessary conditions exist, available as defenses to the defendant. But if the Medical Examiner's report is no part of the application, then, by the express terms of the policy, no statement in such report can "avoid or be used as a defense to a claim" under the policies.

The Medical Examiner's Report is not the application, nor a part of it.

This is shown,—

By the papers themselves, and,

By consideration of their functions;

By the papers themselves:

The application begins, "*This application*" (p. 14, Record.) It ends with the signature of Wiggins. (p. 16, Record.) It contains the proposition by Wiggins that the defendant should insure him. It alone contained the agreement which he makes in connection with the proposition. It is complete in itself. If "this application shall be approved," (page 16, Record.) then the policy will issue. An application is a proposal, and this paper is signed by the "person whose life is proposed for insurance." (p. 16, Record.) The proposal, (application,) being necessarily the statement of Wiggins'

desire for insurance, and the terms upon which he will accept it, which precede his signature. The applicant is the man who makes the application, and so J. D. Torrey, soliciting agent for the defendant, and General Manager of defendant, certifies: "I have known *the above-named applicant* for six years, and saw him sign *this application*." (p. 16, Record.) But the person named as applicant was "above named," and the signature which Torrey saw him make was signed before Torrey's certificate to *this* application, that is, to the paper as to which he certified. Torrey's certificate relates only to the application, and that relates only to the paper which Wiggins had already signed.

There are, upon the face of the papers, no points of contact, except a physical one, arising out of the fact that both the application and the Medical Examiner's Report are printed on the same sheet of paper, and the fact that the Medical Examiner's Report is mentionod in the application. The physical fact is, of course, of no moment. And the other is of scarcely greater weight. Wiggins agrees that "all the following statements and answers, and all those that I make to the Company's Medical Examiner, *in continuation of this application*, are by me warranted," etc. The argument has been made by the defendant that the words "in continuation of this application" incorporate the Medical Examiner's Report into the application, and make it a part thereof. We submit, however, that the words show separation and not identity. Continuation may mean, of course, a mere prolongation of the thing continued, but it also may mean the carrying out of a general plan by a succession of distinct units,—the last supplementing but not a part of the first. And that seems to be the meaning here. Else why use the word "continuation," at all? Why not have said, simply, and unambiguously, that the answers to the Medical Examiner were made "a part of" the application, when the applicant could not be misled as to the effect of what he was doing.

The word "continuation," however, seems to have been selected instead of the words "a part of," with a clear purpose to differentiate the application from the Examiner's Report, and to designate the two as successive steps in the effecting of the insurance,—the first the expression of the desire of the applicant, with his agreement as to terms, and the second, the requirement by the Company for its protection.

It will be noticed also that there is no mention of the application in the Medical Examiner's Report, and no reference to it. Our contention is also supported,—

By consideration of the functions of the two papers.

As we have foreshadowed, the first is the act of Wiggins,—initiated by him as an approach to the Company with an expression of his desire for insurance, and a request that it shall be issued to him upon stated terms. This is his application. The second is the act of the Company,—done entirely for its own protection, and, therefore, done before the "Company's Examiner." It is required, not as a part of the application, but as a step succeeding the application, and, therefore, as a continuation of it in the plan to effect the insurance.

That they are entirely distinct is shown by the consideration that there could be no insurance without an application, formal or informal, written or verbal. But the examination exists entirely upon demand of the Company, and may be entirely dispensed with by it.

The New York Court of Appeals says, speaking of the application, that the blank form "when filled out and signed by the applicant, and delivered to the agent, constituted and completed the application for insurance. Everything that followed the arplication was an element of its result."

> Edington vs. Aetna L. I. Co., 100 N. Y. 536; 3 N. E. 315.

Remembering that all ambiguities must be resolved against the Company,

Thompson vs. Phoenix Ins. Co., 136 U. S. 287,

and that the policy will not be so construed as to embrace causes of invalidity, unless absolutely required.

McMaster vs. N. Y. L. Ins. Co., 183 U. S. 25-40.

It should be held that the application does not include the Medical Examiner's Report.

And so it has been held.

Boehm vs. Com. Alliance, etc., 30 N. Y. S. 660;
Affirmed 35 N. Y. S., 1103;
Higbee vs. Guardian Mut., Etc., 66 Barb. 462.

If the above be the true construction of the contract, then there is left no defense except the defense arising upon the application itself, that is, that Wiggins had previously applied for insurance upon which application no policy had been issued. We, however, discuss further the principles involved in all the questions, taking them up in substantially the order presented by the defendant in its brief.

The Court was right in refusing to direct a verdict for the defendant.

All the statements and answers of Wiggins are, unless fraudulent, representations. The policy so states in the following language:

"All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties." (p. 10, Record.)

It is true that in the application Wiggins warrants his statements and answers to be true, (p. 15, Record,) but it is now elementary that in this conflict the policy provision will prevail, and the statements will be held to be representations and not warranties.

Moulor vs. Am. L. I. Co., 111 U. S. 335-342.

In order to make any plea of misrepresentation available, the defendant must prove,—

That the representation as alleged in the plea was made;

That it was false;

That it was material;

That it was fraudulent.

The making of a representation and its falsity, while essential to the defense, needs no comment here, although we will hereafter question the existence of both as to one or more items of defense.

Materiality. We need not discuss the authorities of the defendant upon the question of materiality, for they assert recognized law, but amount to nothing, except the holding that when the contract of the parties has made the literal truth of a statement material, the Court must hold it so, and that some things stipulated about so clearly are material that the Court will require statements of them to be literally true, and will not permit inquiry by the jury as to their materiality.

Both phases are amply covered by the following from

Phoenix L. I. Co. vs. Raddin, 120 U. S. 189;

"But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of contract. Carpenter vs. Providence Washington Ins. Co,, 16 Pet. 495; Jeffries vs. Life Ins. Co., 22 Wall. 47; Anderson vs. Fitzgerald, 4 H. L. Cas., 484; Macdonald vs, Law, U. I. Co., L. R. 9, Q. B. 328; Edington vs. Aetna L. I. Co., 77 N. Y. 564; 100 N. Y. 536."

But when there is no warranty, and when the subject of inquiry is not upon its face material, the rule is announced in the same case, speaking of misrepresentations, as follows:

"Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the face of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, *as to which substantial truth, in everything material* to the risk, is all that is required of the applicant. Moulor vs. Am. Ins. Co., 111 U. S. 335; Campbell vs. New Eng. Ins. Co., 98 Mass. 381; Thomson vs. Weems, 9 App. Cas. 671."

Phoenix L. I. Co. vs. Raddin, 120 U. S. 189.

The present case illustrates both phases. The representation as to the application previously for insurance was material upon its face, but the representations as to health, surgical operations, resort to a cure, etc., were not so, but could become material only if they were so serious as to affect the longevity of the applicant, or reasonably influence the judgment of the insurer in passing upon the application. These principles have been applied to those questions which relate to the health of the plaintiff, the general rule being thus stated:

"By the questions inserted in the application, the defendant was seeking for information bearing upon the risk it was to take,—the probable duration of the life to be insured. It was not seeking for information as to merely temporary disorders, or functional disturbances, having no bearing upon health or continuance of life."

Cushman vs. U. S. L. I Co., 70 N. Y. 72.

An illness must not be temporary, leaving no after effects, but must be such as to disturb or derange, at least for a time, vital functions.

Conn. L. I. Co. vs. Un. Tr. Co., 112 U. S. 251.

We will discuss the materiality of each of the representations when discussing that representation.

But a representation, though false and material, must be shown to have been fraudulently made.

A statement in the absence of a warranty, and so being a representation, must not only be false, but must, in order to avoid the policy, "have been made knowingly, with a fraudulent intent to mislead and deceive."

Aetna Life Ins. Co. vs. Rehlaender, 68 Neb. 284; 94 N. W. 129.

The case of the Aetna Life Insurance Company versus Moore, 231 U. S. 556, cited by the defendant to the contrary, is not so, for the language of this Court there relied on is merely the quotation by it of the language of the Georgia Court, and not the statement of its own decision.

But whatever may be the general law, the language of this policy requires that an avoiding representation shall not only be material and false, but fraudulent.

"All statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties."

This language has been construed in at least two cases, and in each it is held that under it it is not sufficient that a statement, although material, shall be false, in order to constitute a defense, but it must also be fraudulent.

In a suit against this same Company, upon a policy containing a provision identical with the one just quoted, it was said:

"An application for a policy provided that all statements made by the insured should, in the absence of fraud, be deemed representations and not warranties, and that no such statement of the insured should avoid or be used in defense

to a claim under the policy, unless contained in the written application, etc. It also recited that all of the answers to the Medical Examiner were true and were offered as inducements to the issue of the policy. HELD, that answers to questions in the application as to insured's prior health history were representations and not warranties, and the falsity thereof would not avoid the policy unless fraudulent, under Rev. Codes 5043, providing that the language of the policy must be construed most strongly against insurer."

Pelican vs. Mut. L. I. Co., 44 Mont. 277; 119 Pac. 778.

Of course, the provision of the Revised Codes of Montana, that the language of the policy must be construed most strictly against the insurer, is merely a declaration of the law, without the assistance of a Code.

And an identical provision being invoked in a suit on a policy against another Company, the Circuit Court of Appeals for the Fourth Circuit held,—

"In an action on a life policy, which provided that statements by insured should be deemed representations, and not warranties, in the absence of fraud, no false statement as to an immaterial matter, or not constituting an inducement of the contract, would be a defense, and that representations through mistake would not avoid the policy, unless made with a fraudulent purpose; insurer not being entitled to an instruction that a misstatement or misrepresentation is a material matter would avoid the policy, although such misstatement may have been honestly made."

Aetna L. I. Co. of Hartford, Conn, vs. Outlaw, 194 Fed. 862.

See also the case below,—

Mut. L. I. Co. vs. Green, et al., 211 Fed. 31.

Moreover, the pleas setting up the representations, and alleging them to be false, also alleged them to have been

fraudulently made, (Pleas 1, 2, 3, pp. 54 and 57, and Pleas 10, 11 and 12, pp. 58 and 59,) and thus made the fraudulent character of the representation an issue of which the defendant must sustain the affimative.

Life Ins. Co. vs. Rehlaender, 68 Neb. 284: 94 N. W. 129.

Even if, however, the representations were material and false and fraudulent, the truth was known to the agents of the insurer; this knowledge was the knowledge of the insurer, and it cannot now set up the falsity and fraud to defeat a recovery.

Hogue was the agent of the defendant.

Hogue was an insurance agent, usually representing the Prudential Life Insurance Company, but having failed to get Wiggins insured in the Prudential (p. 134,) he, with the consent and acquiescence of Torrey, who was the manager of the defendant at Mobile, Alabama, (p. 16,) got Wiggins to make an application to the defendant, (p. 124.) himself wrote the application, (p. 126,) delivered it at Pine Barren, Florida, together with the Medical Examiner's blank, to the Florida Medical Examiners of the defendant, (p. 125,) and received them from the Medical Examiners, (p. 125,) and delivered them, through Tapia, to Torrey, the Manager of the defendant, (p. 125.) The Circuit Court of Appeals has already decided that this application was taken, and the contract made, in Florida. Having performed these acts, he was the Agent of the defendant,—

By the admissions of the defendant,

Under the General Law of Insurance Agency; and,

Under the Statute of Florida.

He was an agent of the defendant *by the admissions of the defendant,* for in its special instruction numbered 1, (p. 151,) it speaks of "the Agent Hogue," and in its special instructions numbered 2, 3, 4 and 5, (pp. 151-152,) it speaks of "the Agent

and Medical Examiners of the defendant," and the reference is clearly to Hogue, for the testimony contains no reference to anyone else who could be alluded to as "Agent."

But even if these admissions be not binding upon the defendant, *the Law of Insurance Agency* declares a person performing the functions performed by Hogue, as shown above, to be an agent of the Insurance Company, whose knowledge is binding upon the Company.

A soliciting agent, who prepares application and gets the agent of another company to procure his company to issue a policy, is agent of the insurer, and his knowledge binds it.

Kansel vs. Ass'n., 31 Minn. 17: 16 N. W. 430.

And such an agent, soliciting the insurance, preparing the application, giving it to such other agent, and delivering the policy and receiving the premium, is the agent of the insurer.

Sias vs. Roger Williams Ins. Co., 8 Fed. 183;

May vs. W. Assur. Co., 27 Fed. 260.
(Opinion by Judge Brewer.)

Palatine Ins. Co. vs. McElroy, 100 Fed. 391;

Ahlberg vs. Ger. Assur. Co., 94 Mich. 259: 53 N. W. 1102;

Bliss vs. Potomac F. I. Co., 134 Mich. 212: 95 N. W. 1083;

Mich. F. and M. Ins. Co. vs. Wich., 8 Colorada App. 409: 46 Pac. 687;

Queen I. Co. vs. Un. B. & T. Co., 111 Fed. 697.

In this last case, Day, Circuit Judge, said:

"By accepting the risk and receiving the premium, the Queen Insurance Company ratified the action of Murray & Cole (who were not its agents,) issuing the policy. By this ratification it made them its agents for the purpose of issuing this policy as effectually as it would have done had Murray & Cole been its regular agents," etc.

The knowledge of Murray & Cole was held to be the knowledge of the Insurance Company.

In the Colorado case, it is said,—

"Where a solicitor for a firm of insurance agents procured an application for insurance on property, and the firm being unable to place the entire risk in companies represented by them, applied to another firm of agents, who issued a policy on the property, and authorized the same solicitor to obtain from the insured an application to be delivered to them, which he did, they, and the company for which they issued the policy, are bound by whatever information or knowledge as to the title to the property was imparted to the solicitor, who, for such purpose, was their representative."

The authorities holding that "the general rule that the knowledge of an insurance agent is imputable to the company, applies also in most instances to soliciting agents, with reference to matters made known to him prior to the execution of the policy," (Cooley's Briefs on the Law of Insurance, p. 2524,) are so numerous that in would be idle to cite them.

See also,

Bliss vs. Potomac F. I. Co., 134 Mich, 212: 95 N. W. 1083.

This Court has said, that the insured "looks to and relies upon the agent who has persuaded him to effect insurance, as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him?"

And in answering its own questions declared,

"The powers of the agent are prima facie co-extensive with the business intrusted to his care, and will not be narrowed by limitations communicated to the person with whom he deals. An insurance company, establishing a local agency,

must be responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment as if they proceed from the principal."

And, in speaking of the transaction involved in that case, said:

"If in the transaction we are now considering, Ball, the insurance agent, who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet, the proposition admits of as little doubt that if Ball were the agent of the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal."

Ins. Co. vs. Wilkinson, 13 Wall. 234-235-236.

In that case, the agent was a local agent appointed by the company, but, of course, under the Statute, the person who performs the act performed by Hogue and Kilpatrick, were the agents of the company, with as full power as the local agent.

But as conclusive, *the Statute Law of Florida*, (in which State the Court below had already determined that the contract was made,) declares that:

"Sec. 2765 (2224,) (Gen. Stat. of Fla.,) *Agents.* Any person * * * who in anywise directly or indirectly makes or causes to be made any contract of insurance for or on account of such insurance Company * * shall be deemed to all intents and purposes an agent or representative of such company * * *." And,

"Sec. 2777 (Gen. Stat. of Fla.,) *Who Agent of Company.* Any person who solicits insurance and procures applications therefor, shall be held to be the agent of the party issuing a policy upon such application, anything in the application or the policy to the contrary."

(See a copy of such Statutes attached to this Brief as Appendices "A" and "B.")

Hogue was the agent of the petitioner under either or both of these Statutes.

He was clearly so under Section 2777, for he solicited this insurance, and procured the application, and brought himself directly within the Statute. (The language in this Section "the *party* issuing the policy," is evidently used because the Statute recognized not only corporations, but "associations, firms and individuals," as "parties," who could issue policies. (See Secs. 2757, 2758, 2761, etc.)

And he was clearly so under Section 2765, for under such Statute, the powers of the agent are "those which an agent of an insurance company possesses, upon whose powers and authority no special limitations have been imposed," (that is, an agent with unlimited authority,) and conferred "by an unqualified appointment."

N. Y. L. I Co. vs. Russell, 77 Fed. 105.

Under a like Statute, a broker who obtains for another from the regular agent of an insurance company, a policy which he delivers to that other, and collects premiums from him, is the agent of the company, and his knowledge of facts *affecting the validity of the policy*, "is equivalent to knowledge of such facts by the company."

Welch vs. Fire Assn. 120 Wis. 456; 98 N. W. 227.

Under a like Statute, a local agent may make a verbal contract of insurance, and waive conditions.

Zell vs. Herman F. I. Co. 75 Wis. 521; 44 N. W. 828.

The Court says:

"Under our Statute an insurance company cannot, through the aid of a local agent, secure a contract of insurance and the premium therefor, and at the same time disclaim the au-

thority of such agent to waive stipulations in such contract respecting the then existing conditions of, or incumbrance upon the property insured to the knowledge of such agent."

And under the same Statute, the agent is authorized to change a policy.

Cont. I. Co. vs. Ruckman, 127 Ill. 364: 11 A. S. R. 121.

And under like Statute this Court has said, in effect, that the agent (in that case a local agent,) stood in the same position as the company's "principal officer, having authority in the premises," and acting in the "home office."

Cont. Ins. Co. vs. Chamberlain, 132 U. S. 304-311.

In a case where (as here,) the agent of one company, having failed to get insurance in his company, for an applicant, sought and obtained it in another company through that other company's agent, he was held (under the Wisconsin Statute,) to be the agent of the latter company.

Speiser vs. Phoenix Mut. L. I. Co., 119 Wis. 530: 97 N. W. 207.

And under the same Statute, the same rule was applied to the case where the agent of one company applied to the agent of another company for insurance upon an applicant, and in pursuance of such application, a policy was issued. The person who was agent of the first company was held to be the agent of the insurer.

Schomer vs. Hekla F. I. Co., 50 Wis. 575: 7 N. W. 544: Alkan vs. N. H. Ins. Co., 53 Wis. 136: 10 N. W. 91.

In the former case it was said, (p. 547, 7 N. W. Rep.:)

"The obvious intention of the Legislature is to make an insurance company responsible for the acts of the person who assumes really to represent and act for it in these particulars."

In the latter case it is said, (p. 94, 10 N. W. Rep.,)

"The assured, by his agent, applied to one Weil, an insurance agent, to insure the distillery property. Weil did not place the risk with any company which he represented, but placed it in companies represented by other agents,—the defendant company being one of them. There was no communication on the subject between the plaintiff and the regular agents of the latter company; at least, none is proved. His negotiations were exclusively with Weil. These facts are undisputed, and they make Weil the agent of the defendant company, in respect to this insurance, by virtue of Rev. St. 584, § 1977; for most assuredly he aided and assisted in transmitting an application for insurance by the plaintiff to that company, and the policy in suit from it to the plaintiff. Schomer vs. Hekla Ins. Co., 50 Wis. 575. Weil knew, when the policy was issued, that the premises were unoccupied, and we do not understand that the special verdict negatives such knowledge. His knowledge binds the company."

It is unnecessary to cite authorities showing that *the knowledge of the agent is (generally,) the knowledge of the principal*, for, if it be shown that he is the agent, then it follows that his knowledge is the knowledge of the principal, and in many of the foregoing cases the rule is announced. However, we add, as applying the Statute:

The binding effect of the knowledge and acts of the agent under a like Statute (Nebraska,) is shown in the following from the Circuit Court of Appeals of the Fourth Circuit.

"Under the Nebraska Statute, the agents and medical examiner of the defendant company were 'to all intents and purposes' the agents of the company; and, in their respective spheres, they possessed all the powers and authority conferred on agents and medical examiners of insurance companies by an unqualified appointment as such. It results that the information communicated by the applicant to the company's agents and medical examiner was, in contemplation of law, commu-

nicated to the company itself; and the company, therefore, having issued the policy with knowledge of all the facts, will not be heard to defend upon the ground that these facts were not fully set out in the report of its agents or medical examiner."

New York Life Ins. Co. vs. Russell, 77 Fed. 106.

The question as to the defendants being bound by knowledge of the general agent, made so by the Statute, is foreclosed by the decision of this Court, in a case where an Iowa Statute made a solicitor for an insurance company an agent of the company, and the Court held that the company was bound by the knowledge of such solicitor of the falsity of a statement by the insured, even though the policy declared him to be the agent of the assured. The Court gave effect to the Statute in the following very decisive language:

"If he, (the applicant,) had applied in person to the home office for insurance, stating in response to the questions, * * *" the same facts communicated by him to Boak (the person made by the Statute the agent,) and the company, by its principal officer, having authority in the premises, had then written the false answer" * * "it could not be doubted that the company would be estopped." * * "The same result must follow where negotiations for insurance are had under like circumstances between the insured and one, who, in fact, and by force of the Law of the State where such negotiations take place, is the agent of the company, and is not in any sense an agent of the applicant,"

Cont. I. Co. vs. Chamberlain, 132 U. S. 304-311.

The defendant, however, argues that the Section 2765 does not attempt to "define an agent's powers or authority, nor is it broad enough in its terms to convert either Hogue or Torrey, or the Medical Examiners, into general agents, whose knowledge would be imputed to the insurance company," but

that the purpose of the Florida enactment was to bring persons or firms residing or doing business in the State of Florida, on behalf of foreign companies, and also foreign companies themselves, under the control and regulations of the State of Florida."

We have already discussed the breadth of the power of an agent created by the Statute, if the Statute intended to fix the relation of an agent of the company, in its transactions with third persons, and we need not further discuss it.

We, however, take issue with the position that the Statute was intended to define the relations between the State and foreign insurance companies.

The argument is that such was the purpose of the original act of 1872, (Chap. 1863,) and that that purpose must be found in the succeeding amendments and in the General Statutes, which revise the laws of the State.

Without stopping to inquire whether such was the purpose of the original act, it is clear, from the language of the section as it stood when this policy was issued, (Sec. 2765, Gen. Stat.,) that the intent of the Legislature enacting that revision, called the General Statutes, was to make the persons therein mentioned agents "to all intents and purposes."

Clearly, one of the *purposes* could cover the constantly questioned relation to the insured and the insurer of a person instrumental in procuring insurance from the insurer.

The language being broad enough, is there anything in the collocation of the section with the rest of the section in the title to warrant petitioner's contention?

Clearly, the section does not relate only to foreign insurance companies. It deals with certain acts done for "such" insurance company, *association, firms or individuals*. This relates to insurance companies before mentioned in the preceding sections. The preceding sections relate not only to

foreign corporations, but to corporations organized in the State of Florida, and to associations, firms and individuals. (For example, Sec. 2768 deals with corporations "whether incorporated or organized under the laws of this State or of any other State or county, and Section 2759, prescribes the required amount of assets not only of foreign, but domestic corporations.) Moreover, the section (2765) applies to "firms and individuals," and there can be no pretense that they are foreign corporations, requiring regulation by the State.

Nor is there more force to the suggestion that the provision was intended to define who should be agent for the purposes of subjection of the persons defined as agents to the "provisions, regulations and penalties" of the act of the Statutes. *Per contra*, Section 2758 expressly provides for the "service of persons in any civil action against the company, association," etc., a clear regulation of the relation between the insurer and the insured.

Besides, the section is found under the article "Regulation of Business," and is an entirely different subject from the preceding article, which provides for the "Board of Insurance Commissioners." The "regulation of business," of course, is broad enough to cover, and naturally does cover the relation between the insurer and the person doing business with it. In fact, the article is full of such regulation, even extending to provisions for attorneys' fees in suits against the insurer.

The mere fact that the section may be taken from an act having a more restricted scope, is of no importance in view of the plain intent of the Legislature, as shown by the language of the section as it now stands, and in view of its location in the scheme of insurance provisions, for it was clearly the intent of the revisers, and of the Legislature, to abandon any limitation of its effect to foreign corporations by including "associations, firms and individuals," and to broaden (if it required broadening.) the scope so as to include in the definition of agents their relations to all persons dealing with them.

While it is true that the revisers were not authorized to make law in their revision, yet it is also true that they did make it in many instances, and when the Legislature adopted the revision it made the law as found in it, and if that is clear it makes no difference what the law was before.

"This Court has, in several cases, decided that new provisions inserted by the Commissioners, and changes in phraseology, necessitating a construction different from that formerly placed upon the Statute by the Court, were valid in the revision as enacted by the Legislature."

Holland vs. Webster, 43 Fla. 91.

The adoption by the Legislature of the revision is a new legislative act, and it is obvious that if the language or surroundings of any provision are different from what they were in the old law, the Legislature must be held to have intended a change,—"a change in phraseology creates a presumption of a change in intent."

Crawford vs. Burke, 195 U. S. 190

As has been said by the Supreme Court of Florida, commenting upon a like contention, "the language of the Sections of the Revised Statutes quoted is plain, clear and unambiguous."

Holland vs. Webster, 43 Fla. 91.

In such case, of course, the unambiguity of the Section of the Statute, prevents any resort to a previous Statute for the purpose of construction.

It was, evidently, the desire of the revisors to bring Florida into line with Nebraska, Wisconsin and other States, having Statutes, which regulated, almost in the same terms, the relations between the insurer and the insured

The cases cited by the defendant do not sustain its contention.

The Statute of Illinois construed, in United States F. I. Co. vs. Thomas, 92 Fed. 127, defined "the term agent or agents *used* in this section," and the section referred to dealt only with the regulation of insurance companies by the State, and the Court necessarily held that the definition of agent must be confined to those persons subjected to the regulation provided for by the Section.

The Statute of Massachusetts, (1861-Chap. 170, Sec. 1,) dealt with, in Markey vs. Mut. Benefit Ins. Co., 103 Mass. 78, and in Wood vs. Firemen's Ins. Co., 126 Mass. 316, was a statute which expressly provided that persons performing certain functions should be held to be agents "within the meaning of the following sections," and the Courts necessarily held that the meaning of that following section made them only "so far agents as to be liable to the penalties prescribed General Statutes, Chapter 58, Section 77."

The Texas Statute, (Revised Stat., Art. 3093,) declared that a person performing certain functions should "be held to be the agent of the company for which the act is done or the risk is taken, *as far as relates* to all the *liabilities, duties, requirements and penalties set forth in this chapter.*" The extent to which he was to be held as agent was thus clearly prescribed. The case cited by the petitioner (Hartford F. I. Co. vs. Walker, 94 Tex. 473; 61 S. W. 711,) expressly says that by this language "the legislatures meant the liabilities, duties and penalties prescribed in the subsequent section of the act, which were that the persons who performed such acts for any insurance companies which had not complied with the laws and requirements of the Statutes, should be guilty of a misdemeanor," etc.

The Missouri case, (Mallen vs. Life Ass'n., 168 Mo., App. 563; 153 S. W. 1065,) does *not* hold that the Missouri Statute was not to alter the law of principal and agent, but, upon the contrary, applies the Statute, which provided that "a person

soliciting an application for insurance upon the life of another shall, in any controversy between the assured, or his beneficiary, and the company, arising upon any such application, be regarded as the agent of the company, and not the agent of the insured," to a case between the insured and the insurer, but refused to hold that the Statute applied when the insured colluded with the agent.

The case of John R. Davis Lumber Company vs. Hartford Fire Insurance Company, 95 Wis. 226: 70 N. W. 84, merely decides that in spite of the Statute the insured may employ his own agent to procure insurance for him,—an obvious truth.

None of the cases and none of the reasons of the defendant, show that the Florida Statutes do not govern the relations between the insurer and the insured.

That the knowledge of Hogue was thus the knowledge of the defendant, is shown by each of the authorities cited above, and, of course, it cannot contest the policy because of the falsity of a representation which it knew to be false when it issued the policy.

Drs. Kilpatrick and Turberville, the Medical Examiners, were the agents of the defendant.

By the admissions of the defendant,

Under the General Law of Agency; and,

Under the Statute of Florida.

Both Kilpatrick and Turberville were the Medical Examiners of the defendant by *the admission of the pleas*, wherein they are stated to be the defendant's Medical Examiners. In the first plea (p. 55, Record,) they are mentioned by name as "defendant's Medical Examiner, Geo. C. Kilpatrick," and "defendant's Medical Examiner, Turberville," and in the

succeeding pleas the answers of Wiggins are alleged to have been made to "defendant's Medical Examiners."

It is also shown by the admissions of special instructions requested by the defendant, for example, the 2nd, 3rd, 4th and 5th, (pp. 151, 152 Record.)

It is also shown by the undisputed testimony that they made, for the defendant, the only examinations of Wiggins for these policies which were made.

The general law of agency, as announced by the Courts, declares Medical Examiners of an Insurance Company to be its agents, and their knowledge its knowledge.

"When a medical examiner, authorized by an insurance company to fill up blanks for answers to questions to be propounded to applicants for insurance in a medical examination, or to fill them up, is within the apparent scope of his authority, does so by writing false answers, and thereafter procures the signature of the applicant thereto, after he had given correct answers to the questions, and the company afterwards receives the premium, and issues a policy the company will, upon the death of the insured, be estopped from insisting on the falsity of the answers, although warranted to be true. Assur. Soc. vs. Reutlinger, 25 S. W. 835, citing Ins. Co. vs. Brodie, 52 Ark. 11: 11 S. W. 1016; Flynn vs. Ins. Co., 78 N. Y. 568; Grattan vs. Ins. Co., 80 N. Y. 281: 92 N. Y. 274; Ins. Co. vs. McMurdy, 89 Pa. St. 363; Pudritsky vs. Sup. Lodge, 76 Mich. 428: 45 N. W. 373; Ins. Co. vs. Hazlewood, 75 Tex. 348; 12 S. W. 621."

N. Y. L. Ins. Co. vs. Russell, 77 Fed. 106;

Hoeland vs: W. U. L. I. Co., 58 Wash. 100: 107 Pac. 866;

K. O. P. vs. Cogbill, 99 Tenn. 28: 41 S. W. 340;

Ins. Co. vs. Robison, 58 Fed. 723;

Franklin L. I. Co. vs. Galligan, 71 Ark. 295. 73 S. W. 102.

The powers given to agents and the consequent effect of their knowledge is fully covered by the authorities above cited, under a discussion of Hogue's agency in view of the Statute. We may add, however, that so much does *the Statute* make the person who directly or indirectly causes to be made any contract of insurance for or on account of an insurance company, "to all intents and purposes an agent or representative of such company," that the company cannot, even by its contract with the insured, convert such persons into the agents of the insured.

Cont. L. I. Co. vs. Chamberlain, 132 U. S. 304.

We are now prepared to discuss, in their order, all the alleged false pretenses, (except those which we have eliminated,) and we will apply the above principles of law to each of them, and endeavor to show that the District Court would not have been authorized to direct a verdict for the defendant as to any of them.

The operation called by the defendant an operation for a cyst in the jaw-bone, was nothing more than the removal of an inverted tooth, although the defense rings the changes on it, and seeks to avail itself of it as a basis of alleged misrepresentation by Wiggins as to his having had an illness and having had a surgical operation.

We have shown that though the operation produced an illness, yet, it did not affect the good health or derange any vital functions, or tend to shorten his life, and was hence immaterial.

Nor was it, when regarded as a surgical operation, material. Of course the same principle applies, that even though he had had a surgical operation, and untruly said that he had not, yet such untruth did not avoid the policy, unless the operation was of such a character, or had such consequences, as to produce the effect just mentioned. The evidence, as shown,

fails to prove that it had any after effects, or in anywise affected the desirability of the risk.

There is no evidence that there was any fraud intended by Wiggins in making the representation. The operation was not of a character to indicate to him that it would matter to the insurer whether it was revealed to the insurer or not.

J. C. Hogue knew, at the time of taking the application, of the treatment by Dr. C. A. Thigpen, for the inverted tooth, (p. 98, Record.) So, also, did Dr. G. C. Kilpatrick, one of the Medical Examiners, (p. 91, Record.)

We submit that we have demonstrated that the removal of the inverted tooth was not material; that the representation as to it was not fraudulent; that the agent of the defendant knew the truth as to it, and that the defendant cannot defeat a recovery on the policy because of it.

But if we have not demonstrated these things to the satisfaction of the Court, yet, it was for the jury to determine the questions of materiality, fraud and knowledge, and this Court will not review its findings as to them.

Consultation of Physician within five years.

The questions as to this can be now settled quite readily, for precisely the same principles of law, and nearly the same facts obtain.

The consultation was not material, unless about matter which itself would make it material,—that is, which would affect the soundness of the health or the length of the life, or the derangement of vital functions, etc.,—of the applicant.

Holland vs. W. U. L. I. Co., 58 Wash. 100; 107 Pac. 866;

Blumenthal vs. Berk. I. Co., 134 Mich. 216; 104 A. S. R., 604;

Franklin L. I. Co. vs. Galligan, 71 Ark. 295: 73 S. W 102;

Valendini vs. Met. L. I. Co., 106 App. Div (N. Y.,) 487: 94 N. Y. S. 758;

Smith vs. Metropolitan, etc., 183 Pa. St. 504: 38 Atl. 1038;

Genung vs. Mut. L. I. Co., 60 App. Div. (N. Y.,) 424: 69 N. Y. S. 1041.

The cases cited by defendant in its brief are cases of warranty, and not of representation, or cases where the matter consulted about is material.

There is no claim, as we understand, that the answer was, as to this matter, fraudulent.

But even if material and false, the truth was known to the agent and medical examiner of defendant, and the defendant is bound by that knowledge.

Except a fracture of a bone of the right hand, (Dey, p 104,) there was absolutely nothing shown to have ever been the matter with Wiggins, except pneumonia, (which he stated in his application,) and the inverted tooth, upon which so many pleas are predicated. However, at the time of the application and medical examiner's report, both Hogue and Kilpatrick knew of the inverted tooth and of Wiggins' consultation with physicians about it, (pp. 91 and 132, Record,) and the Company is bound by that knowledge.

The jury has passed upon the fraud, the materiality and the knowledge.

Wiggins' resort to a cure at Hot Springs and to the hospital at Montgomery.

It is unnecessary to elaborate as to these. He went to Hot Springs in order to cure what Dr. Dey thought to be a neural-

gic affection, (p. 104, Record,) and, failing to find a cure, he went to Montgomery, when he discovered that it was not neuralgia, but an inverted tooth, and he went into a hospital to have this tooth pulled.

The whole series of events revolves around the inverted tooth, and if the existence of that inversion, and the removal of the tooth were not material, then it follows, necessarily, that the locality in which they were treated and removed was not material.

Nor is there any fraud claimed, as we understand, with reference to this representation.

Moreover, Wiggins told both Hogue and Kilpatrick of these things (pp. 92, 88, 132, Record,) and this knowledge binds the company.

The jury has passed upon these points.

The previous application to the Prudential Life Insurance Company.

We think that this was material, and that the defendant was entitled to know it, but,

It did, through its agents, know it; and.

Wiggins did not collude with the agents to keep the knowledge from the defendant.

Of course, ordinarily, if the authorized agent of the defendant knew it, then the defendant knew it. That Hogue was such agent, we have shown. That he knew it, see his statement (pp. 134, 135, Record,) and Kilpatrick's statement, (p. 92, Record.)

J. D. Torrey, who was the district manager and soliciting agent of the defendant, and through whom the application was forwarded, and the policy delivered, and the premiums

paid, (pp. 16, 95, 96, 143, Record,) knew, because he was told by Hogue, just before the application was taken. (Hogue, p. 135, and J. R. Tapia, p. 193, Record.)

Kilpatrick also knew, for Hogue told him, (p. 92, Record.)

All this knowledge was either acquired at the time of application, and the medical examiner's report, or was actively discussed, and, therefore, present, in the mind of the agents, at that time.

The Distilled Spirits, 11 Wall. 356.

These facts bring the case squarely within the general principle that the knowledge of the agent of a fact affecting the validity of the policy is the knowledge of the principal. The authorities, including those which we have already cited, are so full to this point that we need not cite any here.

But the defendant says that this general principle does not apply here, because:

The agent knew of the falsity when he inserted it, and it was a fraud on the defendant, and the act of an agent, done in fraud of the principal, does not bind the principal; and,

Wiggins knew of the falsity when he signed the application and the Medical Examiner's reports, and was guilty of fraud as against the defendant, and the defendant is not bound, and,

Wiggins colluded with the agent to defraud the defendant, and, therefore, the defendant is not bound.

To these we answer that while,

If Wiggins had made, in his application, a false statement, which was material, and the falsity of it was not known to defendant's agents, it might have been a false representation which would avoid the policy. (We make this statement most strongly for the defendant, and, therefore, omit the necessity for fraud in the Wiggins statement to avoid the policy, although we insist, as we have heretofore insisted, that *under*

the terms of this policy, fraud, even in the making of a representation, must exist,) or,

If Wiggins had fraudulently made a false statement, and the falsity of it was not known to the defendant's agents, it might, under the policy, have been a breach of warranty, and the policy avoided. But,

1. If the defendant's agents knew that the answer which was inserted in the application was false, the defendant was bound, even though,

a. The agent intended, in writing it, to defraud the defendant; and,

b. Wiggins knew that it was false; and,

c. Wiggins intended to defraud the defendant.

2. If the agent's fraud made any difference, there was no conclusive evidence that the agent intended to defraud the defendant;

3 If Wiggins' fraud, the falsity being known to the agents, made any difference, yet, there was no conclusive evidence of such fraud;

4. When a statement known to the agent to be false is inserted in an application, the insurer cannot avoid the policy except by proof that there was collusion between the applicant and the agent to defraud the insurer; and,

5. There was no conclusive proof of such collusion.

We consider these in the order stated.

1-a. *The intent of the agent to defraud the defendant*, does not avoid the policy.

The theory that the knowledge of the agent binds the principal, because it is presumed that he would communicate his knowledge to the principal, and that when it is shown that he intends to defraud the principal, it cannot be presumed that he defeated his own fraudulent purpose by a disclosure to the principal, must give away, and has given away, to the true

doctrine, that is,—that in the making of an insurance contract, the agent, both with and without the aid of the Florida Statute, stands in the shoes of the insurer, and his acts bind the insurer. This does not depend upon any presumption of communication by the agent to the principal, but upon the broader principle that the agent is *pro hac vice* principal, and that anything known to him is known to the principal. If there were any other rules, then the fraud of the insurer's agent would defeat the contract made with the insured. If the insured joined in the fraud, another question would be presented, which we deal with hereafter. We accordingly find that there are numerous authorities which hold that the fraud or dishonesty of the agent will not defeat the policy.

From these we select:

Fid. & Mut., etc., vs. Lowe, 4 Neb. (unofficial) 59: 93 N. W. 749;

Ger. L. I. Co. vs. Lundenheimer, 127 Ind 536: 26 N. E. 1082;

Germania, etc., vs. McKee, 94 Ill. 494-500;

Kister vs. Lebanon Mut. etc., 128 Pa. St. 553: 5 L. R. A. 746;

Dwelling House Ins. Co. vs. Brodie, 52 Ark. 511: 4 L. R. A. 458;

Menk vs. Home L. Ins. Co., 76 Cal. 50: 14 Pac. 837;

Creed vs. Sun, etc., 101 Ala. 522: 14 So. Rep. 323.

In a case where the Court said that the act of the agent "could not be inadvertent, but was fraudulent," in writing a false answer, the insurer was held bound by such act.

Grattan vs. Metro. L. I. Co., 92 N. Y. 286.

The refutation of the idea that the binding force of the knowledge of the agent is based upon the presumption that the agent will communicate knowledge which he has gained to the principal, runs through several decisions of this Court,

which hold that when the applicant communicates to the agent facts, which would prevent the insurer from accepting the risk, but which the agent construes and inserts his construction in the policy, the insurer is bound. Among such cases, are,

Ins. Co. vs. Wilkinson, 13 Wall. 222;
Ins. Co. vs. Mahone, 21 Wall. 152;
Eames vs. Home Ins. Co., 94 U. S. 621.

In such cases, there can be no presumption whatever that the agent who construed the information which he had received, and wrote it thus construed into the application, would communicate to the insured the information upon which he based his construction.

1-b and 1-c. *The knowledge of Wiggins that the statement was false did not avoid the policy,*

Nor would his intent to defraud the defendant.

We place them together, because we apprehend that it will not be contended that his knowledge of falsity could be material, except as an evidence, or an element, of his intent to defraud.

Wiggins, of course, knew that the statement which he made in his application, as it appeared, signed by him, that is, that he had "never made an application for life insurance to any company or association upon which a policy had not been issued," etc., was not literally true.

But this knowledge, and this intent, are entirely immaterial, in the face of the knowledge of the defendant. Assuming (as we do for the present) that there was no collusion between the applicant and the agent, and, therefore, that the agents were the representatives of the insurer, what difference could it make whether the applicant knew, if the agent also knew?

Fraud is a falsity with an intent to deceive. If the agent knew of the falsity, and that knowledge was the knowledge of the insurer, and that knowledge bound the insurer, what difference could it make that the falsity was intended to deceive? If the insurer, through its agent, knew of the falsity, and still issued the policy, then even though the insured intended to mislead, the insurer, knowing all the facts, was not misled, and no one party can claim an avoidance because of fraud of another party unless he was misled by that fraud. Fraud consists of a misleading, by concealment, or by a false statement, which perverts the facts, but if the concealment is of a thing that the other party knows, or the perversion is known to the other party, then there can be no effective and nullifying fraud.

The rule is well expressed by Pomeroy, as follows:

"If the party receiving a misrepresentation is, at the time when it is made, either from knowledge acquired previously or obtained at that very moment, fully aware of the truth, acquainted with the facts as they really are, he cannot claim to be misled, and cannot defeat or disaffirm or rescind the transaction on the ground that it was entered into through false representations."

2 Pom. Eq. Jurisprudence, Sec. 894.

"The plaintiff, where representations contained in the application are admitted to be untrue, may rebut the presumption of *fraudulent intent* arising from such admission, by showing that the local agent of the company, with full knowledge of the falsity of the statement, entered the answers of the insured and forwarded the application, approved by his own indorsement."

Follette vs. Mut. Acc. Ass'n, 110 N. C. 377.

"A false statement made in the application, when the application constituted a part of the contract, will render the

policy void, and so will any representation of a material *fact by which the company is misled,* if falsely *and fraudulently made.* But where there is a waiver, as in the cases of Hornthal vs. Western Ins. Co., and Dupree vs. Virginia Home Ins. Co., supra, though the false statement be made in the application itself, *it does not mislead,* and cannot be considered an inducement to the contract."

Follette vs. Mut., etc., 107 N. C. 241.

Any intention that Wiggins may have had in making the statement to defraud the defendant would not avoid the policy, for the reason given why his knowledge of the falsity of the statements would not avoid it.

Fraud consists of the act of the person intending to defraud, and of the effect upon the person whom it is sought to defraud. But when the latter knows the truth of the fact sought to be concealed, or misrepresented, of course he cannot be misled or defrauded. In such case, if with the knowledge that the fact is misstated the insurer makes a contract, then it makes it in the light of such misstatement, and not only is not defrauded, but accepts the new contract as presented, and thereby waives the provisions or requirements of the one originally proffered to the applicant.

Many of the authorities speak of such a situation as one of estoppel, and some of them as one of waiver of conditions, but whatever may be the term applied to the act, they all hold that in the absence of restrictions in the policy, when the agent has power to do the acts, he thereby binds the principal. By such act, it is declared that the requirement as to which the misstatement is made is non-essential, and it is thus waived.

We have heretofore shown that the agent of the defendant in this case had, both by the common law and by the Statutes of Florida, power to receive knowledge binding on the defendant, and to waive conditions, and to change the rela-

tions between the parties, and we beg to refer to our previous discussion on pp. 17–24, of this brief. As directly upon the point under discussion, we quote:—

"It is further insisted that, if the statements contained in the application were false, and were known to be false by Richard J. Phillips, *and were made by him for the purpose of deceiving the defendant*, and procuring the policy of insurance, then the company was not liable. The defendant requested a charge embracing the above contention, which was refused by the Court, and such refusal is made the ground of this contention. As before stated, the record shows that *Bott had full knowledge* of the condition of the health of Phillips when he took the application and when he delivered the policy. Nothing was concealed from him. His knowledge was, under the facts, notice to the Company. In this condition of the Record there were no error in refusing this charge."

Sun L. I. Co. vs. Phillips, 70 S. W. 605, (Tex. Civ. App.)

"Notice to an agent of a life insurance company having authority to solicit, make out and forward applications for insurance, to deliver to the assured policies when returned, and to collect and transmit premiums, will operate as notice to the company, and it will be bound by acts then done by him in respect to the business he is transacting."

"An untrue or *fraudulent* statement on the part of the applicant, of a fact material to the risk, will not prevent a recovery against the company, if it, or its agent, authorized as above stated, was informed of and knew the truth in regard to such fact when it received the application and premium and issued the policy."

Miller vs. Mut. Ben. Life, etc., 31 Iowa 216.

In the following case the agent was an agent of the insurance company to which the applicant applied for insurance

on the life of the deceased, but the application was rejected. This agent, knowing of the rejection, and because of it, applied to another company for insurance on the life. In the application to the latter company, the assured represented that he had never been rejected by any other company. The Court, referring to the Statute (Wisconsin,) held that although of course the insured knew that the statement that he had not been rejected, was false, yet, because the person above mentioned, securing the application, knew it also, the insurer was bound, such person being such an agent as could waive the conditions as to the prior application for insurance.

Speiser vs. Phoenix Mut. L. I. Co., 119 Wis. 530: 97 N. W. 207;

Follette vs. Mut., etc., 110 N. C. 381: 28 A. S. R. 696.

* * * * * * *

Upon the point of the waiver by the defendant's agents of the condition that there should have been no other policy applied for and not issued, and upon other points of waiver, the defendant's counsel contend that it was not competent to make such waiver, because the policy made the application and medical examiner's report a part of the policy, and provided that "agents are not authorized to modify the policy."

This is answered by the authorities that we have cited, and by the further consideration,—

That the provisions of the policy limiting the power of the agents made so by a statute like the Florida Statute, is not binding.

Cont. Life Ins. Co. vs. Chamberlain, 132 U. S. 304-310

That this is not a modification of the policy, but is a waiver of the inducement to the policy, or a construction of the acts required to constitute that inducement. And,

That by the language of the policy, the only limitation upon the agent is against modifying the policy after it is issued,

and that this limitation does not apply to those acts which antecede the issuance of the policy.

Mutual, etc., vs. Robinson, 58 Fed., 723-8;
Crouse vs. Ins. Co., 79 Mich. 249: 44 N. W. 496.

2. Even, however, assuming that, as matter of law, fraud upon the part of the agent, Hogue, would avoid the policy, yet there would be no avoidance in this case, upon the ground under consideration, that is, the falsity as to the application to the Prudential, because,

Kilpatrick knew the same fact, and recorded the same answer in his Medical Examiner's report, and there is no contention that he intended to defraud the defendant, and, because,

Torrey, the Manager of the Company, knew the same facts, signed the application in which the statement by Wiggins is made, and, there is no pretense that he, who is not shown to have known Wiggins, or to have seen him in this transaction, intended to defraud the defendant; and,

There is no conclusive evidence that Hogue intended, by the insertion of this answer of Wiggins to defraud the defendant.

While this Court has said that the withdrawing of an application for a policy is equivalent, under an inquiry in an application like this, to a rejection, (Aetna Life Ins. Co. vs. Moore, 231 U. S. 543,) yet this might not be so apparent to a layman, and Hogue might have honestly thought that a difference existed. He laid great stress on the fact that the withdrawal did not impeach Wiggins' physical or moral desirability, but merely rested upon the fact that the Prudential already had, in force, $30,000.00 on Wiggins' life, and that he did not live in a desirable locality.

(Kilpatrick, p. 92; Hogue, 134; Tapia, 144, Record.)

If we assume, as we must, in the absence of proof, that he was honest in the matter, then we must assume that he un-

dertook to say that because Wiggins was a good physical risk, the disinclination of the Prudential to accept him, because of a reason other than one personal to him, would not make him undesirable to the defendant, and, therefore, wrote the answers as written in the application. It will be remembered that he wrote the application. (p. 126, Record.)

He merely construed the provisions of the application and the demands of his principal, and his construction is binding upon the principal. The Court has so decided as to inquiries as to insurance in,

Cont. L. I. Co vs. Chamberlain, 132 U. S. 304.

There is no conclusive evidence of fraud as to this matter, on the part of Hogue, and the question of fraud *vel non* was for a jury, and it having found that there was no fraud, this Court is bound by the finding.

3. If Wiggins' fraud, the falsity being known to the agent, made any difference, yet, there was no conclusive evidence of such fraud.

In fact, there is no evidence whatever of any fraud in Wiggins, in relation to his answer as to this prior application to the Prudential. Hogue knew of the application and of the withdrawal, for he was the agent through whom the application was made, and he himself testifies that he knew of the refusal of the Prudential to take the risk, and of the withdrawal of the application, (p. 134, Record,) and he told Torrey, the Manager of the defendant, (p. 134-5, Record.) Wiggins knew that Hogue knew, and, of course, there was no concealment on his part.

We will show, in discussing the alleged certificate that Turberville examined him, that Wiggins' wealth, position, disinclination to take insurance, good health, etc., all forbid any conclusion that he resorted to fraud to obtain insurance upon his life.

Besides, Hogue was the agent, and Wiggins, knowing that Hogue knew, had a right, under numerous authorities which

we have cited, to rely upon Hogue's determination as to whether the prior application should be inserted or not.

4. Since the agents, Hogue, Torrey and Kilpatrick, knew that the statement as to the previous application to the Prudential was false, the defendant cannot avoid the policy except by proof that there was collusion between Wiggins and the agents to defraud the defendant.

If the premises which we have laid heretofore are correct, then this conclusion follows inevitably: Fraud, of the agent, if any, in the false insertion, cannot be visited upon the insured; the fraudulent intent of the insured to deceive the insurer, is immaterial, if the insurer's agent, and hence the insurer, had knowledge of the intent to defraud, and, therefore, there is no ground of attack left except the ground that the agent has, by the procurement of, or in collusion with, the insured, ceased to be faithful to the insurer, and hence ceased to be its representative or agent. The mere unfaithfulness of the agent would not, as we have shown, have this effect, but if such unfaithfulness be procured or abetted by the insured, of course the insurer would not be bound.

5. There was no conclusive proof of such collusion.

In fa t, there was no proof whatever, for Wiggins knew that the agents knew the truth, and he had a right to rely upon their representing honestly and faithfully their principal in determining what should be placed in the application.

The mere fact that Wiggins knew, if he read the application, that the answer as to the prior application to the Prudential was not true, and that he knew that the agents knew that it was not true, does not prove collusion.

Speiser vs. Phoenix Mut., etc., 119 Wis. 530; 97 N. W. 207.

That case holds that although there was a common knowledge by the agent and the assured that a statement inserted

in the application was false, yet, that whether there was collusion between them was for the jury.

This follows necessarily, because, as we have shown, Wiggins was entitled to rely upon the agents, and whether he did so or not, or connived or colluded with them to defraud the defendant was a question of fact.

The alleged false certificate of Wiggins that Turberville, the Medical Examiner, had correctly recorded his answers to him, Turberville.

This relates to the defenses sought to be set up in the 16th, 17th and 18th pleas, (pp. 63, 64 and 65, Record.)

The gist of these pleas is,

That Wiggins knew of the rule and usage of the defendant, requiring that when a policy applied for exceeded $30,000.00, there should be two medical examinations by two different examiners;

That, knowing of this rule, and the reliance of the defendant upon it, he knew that the two examinations were material; That, so knowing, he certified that Turberville had correctly recorded his answers, and this implied that he had made answers to Turberville;

That he, Wiggins, forwarded the application, with the false certificate to defendant, (who was induced by it to issue the policy;)

That Wiggins did these things fraudulently;

And that the policies were therefore void.

It is not perhaps essential, that the defendant should have proved all of these, but we will endeavor to show that none of them were true, and then to show that if true, the defendant could not, therefor, avoid the policies.

There is no eoidence that Wiggins knew of any rule or custom of defendant, to rexuire two medical examiners.

There is no proof of this. No one told him. Nothing on the face of the Medical Examiner's reports revealed it to him. Two Medical Examiner's reports were presented to him to sign, but so were two applications, and he signed two of each. No rule of the company required the presentation of, and the signing by him of two applications, (Hogue, p 130, Record,) and yet the two were presented. Why does the presentation of two Medical Examiner's reports any more indicate that there should be two separate examinations by two examiners, than the presentation of two applications indicate that there should be separate applications before two soliciting agents? So far as we know, neither Medical Examiner's blank contained, when presented to him, the name of any medical examiner, and why was he not at liberty (in the absence of the proof of any knowledge that two different medical examinations were required,) to assume that both reports would be signed by the same Medical Examiner, for the purpose of the defendant's having duplicates, or for any other purpose of its administration of its own affairs?

Not knowing of the rule, he could not, of course, know of its materiality.

Wiggins did not certify that he had been examined by Turberville.

The certificate replied upon was as follows:

"I hereby certify that my answers to the foregoing questions are correctly recorded by the Medical Examiner.

CILBEY L. WIGGINS,
(Signature of the person examined.)

Witness:

J. S. TURBERVILLE, M. D."

There can be no color to the defendant's contention that Wiggins certified that Turberville examined him, except the appearance of Turberville's name *as a witness* to the signature of Wiggins. His name nowhere appears upon the application, or on the Medical Examiner's statement, signed by Wiggins, except where it appears as a witness.

The inference is quite plain that Wiggins signed this Medical Examiner's report before Turberville signed it, for Turberville testifies that he did not see Wiggins (p. 83, et seq., Record,) and yet, he signed as a witness to Wiggins' signature, and hence Wiggins' signature must have been on the paper when it was presented to him, Turberville, for his attestation. There is no evidence that anyone informed Wiggins that Tuberville was to sign as awitness, or was to purport to have anything to do with the Medical Examiner's report, or that he was to be represented as having examined Wiggins, or even that Wiggins had ever heard of Turberville, and hence there is not only no evidence, but no inference, that in making the certificate mentioned, Wiggins had in mind Turberville, or knew that anyone else had him in mind, or that he would ever appear in the transaction.

The issue presented by the pleas is, did Wiggins certify that he had been examined by Turberville?

It does not suffice to show that Wiggins had certified that a Medical Examiner had examined him, for while the falsity of such a certificate might constitute a defense, yet it is not the defense presented by the pleas, and hence cannot avail the defendant.

If it be contended that he must have intended to refer to some medical examiner, and therefore, to Turberville, the answer is, as we have shown, that there is no evidence that he knew Turberville, or that Turberville was mentioned to him as a Medical Examiner. A further answer is, that the cir-

cumstances show that just as probably he referred in this certificate to Kilpatrick. Kilpatrick had examined him for the Prudential the preceding month, (Hogue, p. 132, Record.) Kilpatrick was then examining for the policies in suit. Wiggins is dead, and no witness states what statement was made to him by Hogue, the defendant's agent, as to why he should sign this second paper. It was a duplicate of the first. Wiggins was procured to sign a second application, (using the words as signifying the paper preceding the Medical Examiner's report,) when it is clear—(and Hogue so says,—p. 130, Record,) that the signing of this in duplicate was unnecessary. Clearly it could have been signed by Wiggins only upon the statement to him that it was desirable to have a duplicate. If desirable to have duplicate applications, when signed by the same person, why not desirable to have duplicate Medical Examiners' reports, made by the same Examiner? And since Wiggins knew that Kilpatrick was an examiner, why not duplicate reports made by Kilpatrick?

Wiggins did not forward the application to the defendant.

This was done by Hogue, and Torrey, defendant's agents. True, of course, that Wiggins made the applications for the purpose of having them forwarded, and knew that they would be forwarded, but this is material, if material at all, upon the question of fraud, which we shall discuss later on.

Wiggins did not intend to defraud the defendant.

Unless the fraud could be conclusively presumed from the signing of the certificate, the fraud *vel non* was for the jury.

Fraud could not be conclusively presumed, unless there was no reasonable hypothesis consistent with innocence. If there was such a hypothesis, it was for the jury to say whether it was true or not.

There was such a hypothesis. Assuming that Wiggins certified that a medical examiner had examined him, it is by no

means unreasonable to assume that in so certifying he meant Kilpatrick, who was known to him, and who signed the other Medical Examiner's Report. This assumption could not be made, if it had been shown, as alleged in the pleas, that Wiggins knew of any rule of the defendant, or of Insurance Companies, that there should be two Medical Examiners, but there is absolutely no proof of any such knowledge upon his part. Repeating in part what we have already said, but upon a different phase, however, the only fact proved is that he signed two Medical Examiner's reports, but it is also in proof that he signed two applications, when clearly it was necessary and required that he should sign only one. (Hogue, p. 130, Record.) It might very readily be that he signed the two applications, in order that the defendant might have duplicates, and the same reason might have dictated his signing two Medical Examiners' reports, he thinking that they referred to the same Examiner, Kilpatrick, who had, with Dr. McLeod, examined him and pronounced him a good risk a month before, (see application and Medical Examiner's report to Prudential Life Insurance Co., signed by Kilpatrick,) and who was familiar with his physical condition, (Kilpatrick, pp. 89-90, Record.)

These may not have been the facts, but they may have been, and this being so, it was for the jury, not the Court, to decide.

* * * * * * *

We can very readily understand how Wiggins, entirely honest and desirous of doing what was right, could have signed these Medical Examiners' reports in blank. Hogue was exceedingly anxious that the insurance policies should be secured. Wiggins was indifferent, and it required much persistence on the part of Hogue to procure an application from him. (Hogue, pp. 124 and 135, Record.) Hogue told Kilpatrick that it was not necessary that he should examine

Wiggins, because Dr. McLeod had a short time previously examined him for the Prudential, and Kilpatrick relied upon Hogue's representations, and signed the Medical Examiner's report, without seeing and examining Wiggins. (Kilpatrick, p. 89, Record.) Why is it not reasonable to assume that he said the same things to Wiggins, and that Wiggins relied upon him as Kilpatrick did? Hogue also told Turberville that he desired him to sign the second Medical Examiner's Report as a confirmation of Dr. Kilpatrick's report, (p. 85, Record.) Why should Hogue not have told Wiggins the same thing? Turberville relied upon this statement of Hogue. Why should not Wiggins do so? Kilpatrick did not know the necessity for an examination at that time. Why should Wiggins have known it? Turberville did not know of such necessity for a second examination. (p. 86, Record.) Why should Wiggins have known? It would seem very evident that Hogue, in his desire to get the matter quickly done, persuaded Wiggins to take the policies and to make the application, and probably assured him that if he did so all annoyance and trouble in the matter should be taken from him, and, in pursuance of this, he, Hogue, made the representations to Kilpatrick and to Turberville above mentioned, and if to them, why not to Wiggins?

* * * * * * *

Nor is there any conceivable reason why Wiggins should desire to commit a fraud upon the Company. He was a wealthy man. (Hogue, pp. 124 and 135, Record.) He considered himself in good health, and so did Hogue and Dr. McLeod. (p. 135 and 121, Record.) There was no expectancy of a near decease on his part, no stringency in money affairs, so far as evidence shows, no reason for insuring himself at all, and, clearly, no anxiety; but upon the contrary, a reluctance to take the insurance, (pp 124 and 125 and 136, Record,) and it cannot be thought, for a moment, that he

would commit a fraud under these circumstances, for the purpose of getting such insurance.

He had nothing to conceal, for he had been examined by McLeod and Kilpatrick on November 4, 1908, just a month and a week previously, and pronounced "free from mental and physical defects, and in good health," and "a first-class risk." (J. C. McLeod, p. 121, Record,) (and see original Medical Examiner's reports of McLeod and Kilpatrick to the Prudential Life Insurance Company produced by Dr. Burrage, and before this Court in the original.) There was not one word of evidence that he was, at the time of his application to the defendant, in other than the best of health, or that he had any disease or illness, (even a toothache,) but, on the contrary, Kilpatrick, upon the examination of him, a day or two afterwards, found heart and kidneys apparently all sound and right. (Kilpatrick, p. 90, Record.)

His past health history was not hidden, but disclosed to both Hogue and Kilpatrick.

There was, then, nothing whatever for him to fear from an examination, and no reason why he should resort to fraud to avoid it.

Nor does the testimony show that he had anything whatever to do in preventing the examination. McLeod and Kilpatrick had examined him on November 4, 1908, and Hogue told Kilpatrick that he need not examine him again, (Kilpatrick, pp. 88-90, Record,) and Hogue told Turberville that he need sign the Examiner's Report only "as a confirmation of Kilpatrick's examination." (Turberville, p. 85 Record.) This action of Hogue is not shown to have been done with Wiggins' knowledge or consent, and it is quite reasonable to suppose that he told Wiggins what he told Kilpatrick and Turberville, or that he told him nothing, except that he should sign the reports, and that Kilpatrick, who had previously examined him, would fill them in. However this may

be, there is clearly no testimony connecting Wiggins with any fraud or collusion.

The policy was not void, even though Wiggins made the false certificate, and did it fraudulently, because,

Defendant's agents knew all the circumstances.

That Hogue, Kilpatrick and Turberville were the agents of the defendants, we have shown.

That they knew all the facts connected with the Turberville certificate, and his lack of examination of Wiggins, is clear. Hogue went to Turberville, with Kilpatrick's report; asked Turberville to sign a report as confirmation of Kilpatrick's report, (p. 85, Record,) and Turberville, not knowing that a second examination was required, (p. 86, Record,) copied the answers which Kilpatrick had written. (p. 85, Record.) Hogue received this from Turberville, (p. 86, Record,) and delivered it to Tapia, to be delivered to Torrey, (defendant's District Manager,) (p. 129,) who did deliver it to Torrey, (p. 143, Record.)

Of course, then, they knew that Wiggins had not been examined by Turberville, and knew that Wiggins' certificate, (if he made one,) to the contrary was false.

The effect of such knowledge has already been discussed by us on pp. 21-24 of this brief.

According to the authorities there cited, and numerous others that might be cited, it operated as,

An estoppel upon the defendant, for its agents knew the transaction and the circumstances surrounding it, and yet, acting for the defendant, accepted the risk, and the defendant issued the policy and received the premiums, and it was estopped, or, as,

A waiver, for if the agents knew the transaction, and the conditions surrounding it, and yet forwarded the application

and Medical Examiner's reports, without insisting upon a compliance with the usual requirements of the defendant, then they, and hence it, waived such requirements. In this case, if the double medical examinations were a condition, then the knowledge of Hogue and Turberville, that there had not been two examinations, was a waiver of the one which did not take place. Of course, the company itself could waive a medical examination, or if two were required, could waive one of them, and the agents, standing in the place of the company, could, under the foregoing authorities, likewise waive such examination; or, as

A construction of the requirements of the defendant, for if the agents, knowing of the good health of Wiggins, and his entire desirability as a risk, construed the instructions by defendant to them as agents, or its requirements, that a double medical examination was not necessary in such a case, then the defendant is bound. In this case, Hogue knew, from the previous examination by McLeod and Kilpatrick, of Wiggins, for the Prudential Life Insurance Company, that Wiggins was in good health and a fit subject for insurance; that an examination by a second physician would not reveal any reason why the policies should not issue, and construed in such case the duty of the Medical Examiner, and found that the medical examination by Turberville was unnecessary. The assured was, of course, authorized to rely upon the finding.

The agent has power to construe the requirements made by the principal, and to determine whether they have in a given case been complied with or not, and if he knows, in such case, that there has been an incomplete or insufficient compliance, and accepts it, he construes it to be sufficient.

Judge Cooley says:—

"The forms and requirements of different insurers are different, and when an agent, who at the time and place is sole representative of the principal, assumes to know what infor

mation the principal requires, and after being furnished with all the facts, drafts a paper *which he declares satisfactory*, induces the other party to sign it, receives and retains the premium moneys, and then delivers a contract which the other party is led to believe, and has a right to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity on the ground of his agent's unskillfulness, carelessness *or fraud*."

Ins. Co. vs. Olmstead, 21 Mich. 252.

"Every applicant accepts without question the advice, direction, and assurance of the agents in all matters relating to the preparation of the application. This is a part of the duty of such agents, and the applicant has a right to assume that they will discharge it intelligently and honestly. He has a right to assume, also, that the agent will honestly and faithfully discharge his duty to his principal."

N. Y. L. I. Co. vs. Russell, 77 Fed. 105;

He "had a right to assume that the answers which he did make were accepted as meaning, for the purpose of obtaining a policy, what (Hogue-Kilpatrick-Turberville) stated them * * to be." "The acts and declarations of (each agent) are to be considered the acts and declarations of the Company, whose agent he was, and (Wiggins) was justified in so understanding them."

Ins. Co. vs. Mahone, 21 Wall. 156.

Whatever route we take, we arrive at the same goal, that is, the policy was not avoided.

Nor, as we have shown, is the result affected by any fraudulent design which the agents may have nor any fraudulent design which Wiggins may have had, unless he colluded with them.

No collusion has been proved. As we have already shown,

the mere knowledge of Wiggins that the answer was false, does not prove collusion.

Speiser vs. Phoenix Mut., etc., 119 Wis. 530: 97 N. W. 207.

And any presumption of collusion in this case is repelled by the utter indifference of Wiggins as to procuring the insurance and his necessarily well founded opinion that his health was such that examination would not prevent the issuance of the policy, and, therefore, that fraudulent collusion would have been unnecessary.

* * * * * * *

The defendant contends that the following cases, decided by this Court, are conclusive of this cause. We accordingly discuss their applicability:

Aetna Life Ins. Co. vs. Moore, 231 U. S. 543;

Prudential Life Ins. Co. vs. Moore, 231 U. S. 560.

There is nothing decided in these cases which militates against the contentions which we have made. They decide,

That under the Law of Georgia, if a misrepresentation be material, it avoids the policy, even though made in good faith. In the instant case, however, there was not a Statute having this effect, and besides, the policy involved herein, as construed by the authorities which we have cited, expressly make fraud essential.

They further decide that the knowledge of the agent in those cases, was not the knowledge of the insurer. However, there was an express provision in the policy, which prevented such effect, by limiting the power and authority of the agent.

In this case, there is no such limitation in the policy, and this Court, in the cases under consideration, expressly distinguishes a policy with such a limitation from one where no such limitation exists. Also there was not under consideration in that case any such Statute as the Florida Statute, which makes the agents of the defendant agents "to all in-

tents and purposes,"—a Statute which would destroy the effect of the policy limitations. (Cont. L. I. Co. vs. Chamberlain, 132 U. S. 304-310.)

New York Life Ins. Co. vs. Fletcher, 117 U. S. 531.

In this case, the Court held,

That the provisions of the policy limited the powers of the agent, and that hence his knowledge was not the knowledge of the Company. It distinguishes the policy in this respect from those involved in Insurance Co. vs. Wilkinson, 13 Wall. 222, and Insurance Co. vs. Mahone, 21 Wall. 152, in which the policies are without limitation. In the instant case, not only was there no such limitation, in the policies, but the Statute of Florida made the persons effecting the insurance agents of the insurer.

The Court also held that it was the duty of the insured to read his policy, and he would then have discovered the falsity of an answer contained in the application, and, after discovery, he could not hold the policy without fraud on the insurer.

This doctrine has no application to this case. The decision there is clearly dependent upon the decision that because of the terms of the policy, the agent's knowledge and acts could not bind the insurer, and hence, that despite such knowledge and acts, the assured owed a duty to the insurer to notify it as soon as he discovered that a false answer had been put into the application and submitted to it. But in this case, the agents intervened between the insured and the insurer, and the agents knew, and he knew they knew, so that there was nothing to communicate to the insurer. Their knowledge was its knowledge. If, with and by that knowledge, it was estopped, or waived conditions, or construed its requirements at the very inception of the contract, then there was no necessity for further communication to it of the facts already known to it, and acted upon by it, through its agents.

Assignments presenting alleged error in the charge to the jury, and in refusing the charge as requested by the defendant.

We consider them in the order in which the defendant considers them.

Assignments 1, 2, 3 and 7.

The complaint of the defendant under these assignments is that the District Judge charged the jury that a misrepresentation by Wiggins must have been fraudulently made to produce an avoidance of the policy.

This was correct, as we have heretofore shown.

It was, if error, harmless error, because the uncontradicted evidence, all of which is before the Court, shows that the agents of the defendant knew the truth, as to each representation made, and that, therefore, the defendant is bound, unless there was collusion between the assured and the agents.

Assignments 4 and 5.

The contention of the defendant under these is that Hogue, Kilpatrick and Turberville, were stated by the Court to be the agents of the defendant, when it was shown by the evidence that they were not.

The statement of the Court was not error, for the facts were undisputed as to the functions of each of them, and we think that we have demonstrated that under the general law of agency and under the Statute of Florida, they were agents of defendant, and that the defendant, in its pleas and instructions requested, has itself admitted them to be its agents.

The further suggestion made by defendant, that the charge covered by the fourth assignment "led the jury to believe that

everything that Wiggins might have told Hogue, or Kilpatrick, or Turberville, formed a part of the contract, whether it was included in the application or policy, or not," is too wiredrawn to need comment.

Assignments 6 and 8.

These raise only the question as to whether Hogue and the Medical Examiners were the agents of the defendant, and whether their knowledge was, therefore, the knowledge of the defendant. We have already fully covered these questions.

Assignment 10.

The contention made under this assignment is the same as under 6 and 8 just discussed.

Assignment 11.

The charge requested as shown by this assignment was probably unobjectionable, but the Judge had already fully charged to the same effect, as follows:

"If you find from the evidence that the statements of Wiggins in the several matters inquired about his health and operation and treatment in a sanitarium were false, and further find that the agents Hogue, and Torrey and Turberville, knew they were false, and you further find from the evidence that there was an understanding, tacit or expressed, between Wiggins and the said agents, to *procure the policies by collusive co-operation to conceal the truth from the company, as to the several matters inquired about*, then such conduct upon the part of Wiggins would avoid the policies, and the plaintiffs could not recover in this action.

"If you find that Turberville knew that he had not made an examination of Wiggins, or propounded any question to him, and that Wiggins had misstated the facts when he certified

that his answers were correctly recorded by the Medical Examiner, then if you find from the evidence that Turberville was such an agent of the company as to bind it by his, Turberville's, knowledge, and that the defendant knew of such false certificate, in that case the defense of the defendant based upon said alleged false representations, cannot be sustained. But if Wiggins knowingly signed the certificate in blank, which purported to contain the answers to the medical examination by Dr. Turberville, and before his answers had been inserted therein, it was a material representation and binding on him, and, if false, would avoid the policy, unless the company, through its Medical Examiner, Turberville, had knowledge that the certificate was false. If it was signed by Wiggins in blank *in collusion or under an express or tacit understanding with Turberville* that Wiggins was not to make the answers, then it would be such a false representation as to avoid the policy." (pp. 148-149, Record.)

And was not required to charge the same matter again.

Assignment 12.

The request which was refused by the Court announces the very peculiar doctrine that after a corporation has been fixed with notice, because of notice to the agent, such agent can absolve the corporation from the effect of the notice by purposely failing to notify the corporation of the notice, and of his knowledge of the things involved in it, and that by such failure he can, himself, without the knowledge of the other party, convert himself from agent of the corporation into agent of the other party. It involves the singular doctrine that when a person is once the agent of one party to a contract, he can become the agent of the other party without any act of that other party and without any further communication with him, but simply by a mental operation—a purposeful failure to notify his principal.

There is no authority cited for this proposition, and none can be found.

Assignments 13 and 14.

These merely seek to maintain the untenable position that only the knowledge of the company "at its home office," or through a "general agent," is the knowlege of the insurer. We have already discussed this fully.

Assignments 15 and 16.

The assignments cannot be sustained, because,

1. There is no evidence "that Wiggins understood that two medical examinations were required by the rules of the Company:"

2. There is no evidence that he certified to two examinations by separate physicians. The certificates, as we have shown, designate no physician, and it is entirely compatible with their terms that they related to the same physician, especially as there is no evidence that Wiggins knew that Turberville was to be considered as an examining physician, or was to write any alleged answers, or to sign any report.

3. The pleas, 16, 17 and 18, (pp. 81 to 84, Record,) only put in issue an alleged false certificate as to one examination, etc., by Turberville, while this instruction involves the falsity of two certificates,—one as to Kilpatrick and one as to Turberville.

4. The instruction relies only upon the untruth of Wiggins' alleged certificate, and ignores the element of fraud; which we have shown to be essential.

5. The instruction ignores the fact that all this may have, under the evidence, been known to the agent and medical examiners of the defendant, and hence known to the defendant

Assignments 17, 18, 19 and 20.

Each of these instructions, upon the refusal of which error is predicated, required a direction of the verdict for the de-

fendant, upon the hypothesis that certain facts existed, but the hypothesis was not comprehensive enough, because no verdict could pass, under the facts, in favor of the defendant, unless,

1. The jury found that the answers and representations of Wiggins were fraudulent;

2. And unless they failed to find that the agent or medical examiners knew the facts which are stated in the instructions to be a bar to recovery.

3. The instruction requested the Court to determine the materiality of the alleged false answers, whereas, under the law, the materiality is to be determined by the jury and not by the Court.

These instructions relate to Wiggins' answer that he had not consulted physicians, that he was in good health, that he had not undergone any surgical operation, that he had not been under treatment in any asylum, cure, hospital or sanitarium.

The only evidence upon which the defendant relied to sustain the allegations of the pleas upon which these instructions were based was evidence that Wiggins had had an inverted tooth, and had had it extracted, and, misconceiving it to be neuralgia, had gone to Hot Springs, and had consulted physicians as to the cause of the pain which he suffered from it, and had been in a hospital while and after it was removed. The whole defense of the defendant then, in the pleas mentioned, revolves around this tooth. It was not a disease, it did not affect his health, the operation was not one which left any permanent result, and they were not material. If there is any doubt as to materiality, it is a question for the jury and not for the Court. The law relating to this matter is well stated.

"The representation in an answer for life insurance, that the applicant is in good health, or that he had not been, subject

to illness, means that he has not suffered illness of a serious nature, tending to undermine his constitution, and that his state of health is free from disease that affects the general soundness or healthiness of the system," and,

"The representation in an application that an applicant has not been attended by a physician, nor consulted one previously, is not false, if the applicant merely omits to state a treatment for some temporary indisposition."

Blumenthal vs. Berkshire L. I. Co., 134 Mich. 216: 104 A. S. R., 604.

We have heretofore further and fully discussed the questions raised by these assignments.

Assignment 21.

We submit the same argument under this assignment as we have submitted under the four previous ones, except that, we admit the question as to the application to and rejection by another insurance company was material.

Assignment 22.

This assignment cannot be sustained, because,

It left to the jury to determine what "material inquiry contained in the application" was.

It omitted the qualification that the misrepresention would not defeat the policy if the agent knew the truth.

It seeks to make carelessness equivalent to fraud. The policy requires that in order to defeat the complainant, Wiggins' answers must have been fraudulent. This instruction would have caused the jury to eliminate this requirement of the policy, and permit itself to base its verdict upon mere carelessness. As showing that mere carelessness or negli-

gence cannot have the effect, in insurance representations, of fraud, we cite,

Pa. Mut., etc., vs. Mechanics, etc., 73 Fed. 654, in which Judges Taft, Lurton and Hammond lay down the true doctrine.

Assignment 23.

This assignment is predicated upon the idea that the retention by Wiggins of the policies containing alleged false representations prevented his beneficiary from recovering. We have already answered this in our comment upon the case of New York Life Insurance Company versus Fletcher, 117 United States, 519.

To apply the doctrine asserted by the defendant would, in every case, preclude the assured from taking advantage of the fact that he was misled by the agent, or of the fact that the agent had knowledge of the truth or falsity of answers or representations made, and would thus destroy a large substantive body of insurance law.

Respectfully Submitted.

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EXHIBIT "A."

ARTICLE 3.

REGULATION OF BUSINESS.

2765. (2224.) *AGENTS.*—any person or firm in this St[illegible], who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in anywise, directly or indirectly makes, or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual.

EXHIBIT "B."

2777. *WHO AGENT OF COMPANY.*—Any person who solicits insurance and procures applications therefor shall be held to be agent of the party issuing a policy upon such application, anything in the application or policy to the contrary notwithstanding.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* HILTON-GREEN, EXECUTORS OF WIGGINS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 126. Argued December 9, 1915.—Decided June 12, 1916.

Material representations in an application for life insurance which are incorrect, if known to be untrue by the assured when made, and nothing else appearing, invalidate the policy issued by the insurer relying on such representations, without further proof of actual conscious design to defraud.

The general rule, which imputes an agent's knowledge to the principal, does not apply when the third party knows there is no foundation for the ordinary presumption, and he is acquainted with circumstances plainly indicating that the agent will not advise the principal.

The rule imputing agents' knowledge to the principal is intended to protect those exercising good faith and not as a shield for unfair dealing.

While § 2765, Florida Statutes, undertakes to designate as agents of insurance companies certain persons, in fact, acting for such companies in some particulars, it does not fix the scope of their authority as between the company and third persons, and does not raise special agents with limited authority into general ones with unlimited power.

One consciously permitting an application containing material misrepresentations to be presented by subordinate agents to officers of a life insurance company, under circumstances which he knows negatives any probability of the actual facts being revealed, and later accepting policies which he knew were issued in reliance upon statements both false and material, can claim nothing under such policies.

An applicant for insurance should exercise toward the company the ame good faith which he may rightfully demand from it; the relationship demands fair dealing by both parties.

211 Fed. Rep. 31, reversed.

THE facts, which involve the construction and effect of an application for life insurance policy containing false statements, and the liability of the company issuing policies in reliance thereon, are stated in the opinion.

Mr. Frederick L. Allen, with whom *Mr. Emmett Wilson*, *Mr. Philip D. Beall* and *Mr. Murray Downs*, for petitioner.

Mr. W. A. Blount, with whom *Mr. A. C. Blount* and *Mr. B. F. Carter* were on the brief, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Respondents sued to recover upon four policies, not different except as to numbers, for $7,662.00 each and dated December 16, 1908, on the life of their testator Wiggins, who died March 26, 1910. By various pleas the insurance company set up that the application upon which policies were based contained material representations both false and fraudulent. In reply the executors denied truth of each plea and also alleged that if the appli-

cation contained any misrepresentations the actual circumstances were known to company when policies issued.

Two separate application blanks, each plainly printed upon a large single sheet, were filled out and presented. They are substantially identical except medical examiner's report upon one, dated December 15, 1908, is signed by Geo. C. Kilpatrick, M. D., in two places, while the other, dated December 16, 1908, is twice signed by J. S. Turberville, M. D. (Under the company's rules where insurance applied for amounted to $30,000 two medical examinations were required.)

At the top of each sheet the following appears: "THIS APPLICATION made to the Mutual Life Insurance Company of New York is the basis and a part of a proposed contract of insurance, subject to the charter of the company and the laws of the State of New York. I hereby agree that all the following statements and answers, and all those that I make to the company's medical examiner, in continuation of this application, are by me warranted to be true, and are offered to the company as a consideration of the contract, which I hereby agree to accept, and which shall not take effect unless and until the first premium shall have been paid, during my continuance in good health, and unless also the policy shall have been signed by the president and secretary and countersigned by the registrar of the company and issued during my continuance in good health; unless a binding receipt has been issued as hereinafter provided."

Immediately thereafter are statements concerning assured's address, occupation, birth, character of policy desired, etc., and finally this, alleged and shown to be untrue: "22. I have never made an application for life insurance to any company or association upon which a policy has not been issued on the plan and premium rate originally applied for, except as to the following companies or associations: None, and no such application

is now pending or awaiting decision." And this part of the paper concludes:

"Dated at Pine Barren, Fla. Dec. 15, 1908.

Signature of person whose life is proposed for insurance, } CILBEY L. WIGGINS

I have known the above named applicant for six years and saw him sign this application. I have issued binding receipt No.—.

J. D. TORREY Soliciting Agent,

[by rubber stamp]

J. D. TORREY, MANAGER,

MOBILE, ALA."

On lower portion of the same page, under caption "Medical Examiner's Report," are sundry statements, ostensibly by applicant, concerning his health, history, etc.—among them the following, alleged and shown to be untrue:

"3. (a) What illnesses, diseases, or accidents have you had since childhood? Pneumonia. Number of attacks: One. Date of each: 1899. Duration: 30 days. Severity: Not severe. Results: Complete recovery."

"4. State every physician whom you have consulted in the past five years. None."

"8. Have you undergone any surgical operation? No."

"13. (a) Have you ever been under treatment at any asylum, cure, hospital or sanitarium. No."

"16. Have you ever been examined for a policy in any company or association which was not issued as applied for? No."

This division ends thus:

"Dated at Pine Barren, State of Florida the 15 day of December 1908 Witness: I certify that my answers to the foregoing questions are correctly recorded by the Medical Examiner.

GEO. C. KILPATRICK, M. D. CILBEY L. WIGGINS

Signature of person examined."

At the top of reverse page, under "Medical Examiner's Report (Continued)", there are many answers purporting to be replies to inquiries propounded by medical examiner concerning applicant's figure, apparent age, measurements, pulse, results of physical examination and personal investigations, etc. And then the following:

"I certify that I have made this examination at Pine Barren, Fla., on this 15 day of December, 1908, and that the foregoing questions have been put, and the answers of the applicant recorded as stated.

GEO. C. KILPATRICK, M. D.
Medical Examiner."

The four policies, after being signed in New York by the president, secretary, and registrar of the company, were delivered to assured in Florida. Among others, they contain these clauses:

"This policy and the application herefor, copy of which is indorsed hereon or attached hereto, constitutes the entire contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the insured shall avoid or be used in defense to a claim under this policy unless contained in the written application herefor, a copy of which is indorsed hereon or attached hereto." "Agents are not authorized to modify this policy or to extend the time for paying a premium."

During summer of 1907 assured suffered serious pains in his head and, after consulting more than one physician, went to a sanitarium at Montgomery, Alabama, and was there operated on for a cystic enlargement of the lower jaw caused by an impacted wisdom tooth. He was confined to the sanitarium for ten days and remained under

immediate care of a physician from July 16th to August 13th, 1907.

Early in November, 1908, he applied to Prudential Insurance Company of America through J. C. Hogue, a special agent operating under J. R. Tapia, its manager at Mobile, Alabama, for insurance amounting to $40,000. The application was accompanied, according to its requirements, by two medical reports dated November 3d and 4th, signed respectively by Dr. J. C. McLeod and Dr. Geo. C. Kilpatrick. Several weeks later the company indicated unwillingness to accept risk because of location but the application although marked "withdrawn" was retained. At this time Wiggins had $30,000 insurance with the Prudential, $20,000 with the Equitable, and $5,000 with fraternal insurance companies.

The application of petitioner now under consideration resulted from earnest and persistent solicitation by the same J. C. Hogue. The circumstances under which papers were prepared and signed are not entirely clear; but it appears without contradiction that they were not signed by assured in Torrey's presence—there was no personal acquaintance between the two men. Also that neither medical report was signed by assured in presence of Dr. Geo. C. Kilpatrick or Dr. J. S. Turberville; and that neither physician made the personal examination certified by him. The physicians filled the blanks and signed their names at Hogue's request and because of his representations. Through Torrey, petitioner's district manager at Mobile, the application was forwarded to New York, and, relying upon its statements, officers there issued policies and sent them to assured with copies of application papers which by reference were incorporated therein. So far as appears, assured accepted them without objection and paid the premiums.

An effort was made to show that facts concerning Wiggins' medical history, former unsuccessful application to

Prudential and circumstances surrounding transactions now in question were known by Hogue, the medical examiners, or Torrey, each of whom it is claimed was petitioner's agent.

Assured was sixty-one years of age, president of a lumber company, apparently a man of considerable wealth, and experienced in insurance matters.

At conclusion of evidence counsel for insurance company asked a directed verdict. This was refused; and the court in effect instructed the jury: That in order for company successfully to defend upon ground of false statements these must have been material and made by Wiggins with knowledge of their falsity and with a fraudulent purpose—that is, with intent to deceive. That if they believed it knew of their falsity when application was accepted, no defense could be based upon them. That it knew the actual facts if the jury "should find that an agent whose knowledge would be the knowledge of the defendant did so know." But if the jury found that falsity of statements was within knowledge of Hogue and Torrey and medical examiners and further found an understanding, tacit or express, between Wiggins and said agents to procure the policies by collusive coöperation to conceal the truth, there could be no recovery. Excerpts which follow fairly indicate general import of charge:

"The contract of insurance in this case as expressed by the policies, embraces the statements and representations of Wiggins, the deceased, made to the agent, Hogue, or to Kilpatrick, or Turberville, the medical examiners. Such statements were required to be truthfully made, and was a condition for the issuance of the contract, and this contract provides that all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties. Whether the representations made by Wiggins in his application for insurance had been rejected; or whether he had been treated in a cure, san-

itarium or hospital; or whether he had undergone a surgical operation; or whether he had had any illness or disease; or whether he had consulted a physician for his health, to serve as a defense by the company to this action, depends on whether such statements were knowingly false and fraudulently made.

"If Wiggins knew they were false, and that he made them with the fraudulent purpose of obtaining the policy of insurance, then such statements would avoid the policy and would serve as a good defense by the company; provided, that the company at the time it accepted the application of the deceased as an insurance risk, had no knowledge of the falsity of the statements and representations made by Wiggins in his application for insurance.

"The knowledge of the agent of the insurance company would be the knowledge of the company, and if the agent representing the company in taking the application, or the statements of the medical examiners had knowledge of the falsity of the statements, then the insurance company would be estopped from setting up such false statements or misrepresentations of which they had knowledge before the issuance of the policy as a defense to this action.

. . .

"If you find from the evidence that the statements of Wiggins in the several matters inquired about his health and operation and treatment in a sanitarium were false, and further find that the agents Hogue, and Torrey and Turberville knew they were false, and you further find from the evidence that there was an understanding, tacit or expressed, between Wiggins and the said agents to procure the policies by collusive co-operation to conceal the truth from the company as to the several matters inquired about, then such conduct upon the part of Wiggins would avoid the policies, and the plaintiffs could not recover in this action."

Petitioner made timely objections and presented special

requests, setting forth its theory, which were denied. The Circuit Court of Appeals affirmed a judgment upon verdict for respondents. Among other things it said (211 Fed. Rep. 31, 34–35):

"That, under the language of the policies involved in this suit, the defendant, to avoid the policies for false representations, must establish their falsity, materiality, and the knowledge of the insured, actual or imputed, of their falsity.

. . .

"This leaves for consideration the representation of the insured that he had been examined by Dr. Turberville, defendant's medical examiner, and that the answers recorded by the medical examiner in his report were correct. In truth, there was no such examination had, and the insured must have known that there was none, and the representation that there had been one was a material one. So with regard to the representation of the insured that there had been no previous application for insurance made by him and rejected or not passed upon favorably by the insurance company. This was untrue, must have been known to have been untrue by the insured when he made it, and it was material. Either of these two last representations would be sufficient to avoid the policies, unless the defendant is estopped to rely upon them, by reason of its knowledge of their falsity. It had such knowledge, if at all, because of the knowledge of its agents and examiners, who handled the matter for it."

And further (p. 37): "The statute [§ 2765, General Statutes of Florida—copied in margin] [1] prescribes that every

[1] "2765. *Agents.*—Any person or firm in this State, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal

person who receives money for an insurance company in payment of a contract of insurance, or who directly or indirectly causes to be made any contract of insurance, shall be deemed to all intents and purposes an agent or representative of such company. Under this description, we think Torrey, the defendant's Mobile manager, Hogue, the soliciting agent, and the two medical examiners were agents of the defendant to all intents and purposes, and so, for the purpose of charging it with notice of what they knew, when the policies were written."

All parties treat the policies as Florida contracts. The medical examiners' reports are plainly integral parts of application and by apt words the latter became an essential constituent of the policies.

Considered in most favorable light possible, the above quoted incorrect statements in the application are material representations; and, nothing else appearing, if known to be untrue by assured when made, invalidate the policy without further proof of actual conscious design to defraud. *Moulor* v. *Am. Life Ins. Co.*, 111 U. S. 335, 345; *Phœnix Life Ins. Co.* v. *Raddin*, 120 U. S. 183, 189; *Aetna Life Ins. Co.* v. *Moore*, 231 U. S. 543, 556–557; May on Insurance, 4th ed., § 181.

The general rule which imputes an agent's knowledge to the principal is well established. The underlying reason for it is that an innocent third party may properly presume the agent will perform his duty and report all facts which affect the principal's interest. But this general rule does not apply when the third party knows

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thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise, directly or indirectly makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

there is no foundation for the ordinary presumption—when he is acquainted with circumstances plainly indicating that the agent will not advise his principal. The rule is intended to protect those who exercise good faith and not as a shield for unfair dealing. *The Distilled Spirits*, 11 Wall. 356, 367; *American Surety Co.* v. *Pauly*, 170 U. S. 133, 156; *American Natl. Bank* v. *Miller*, 229 U. S. 517, 521, 522; Mechem on Agency, 2d ed., § 1815.

Section 2765 of the Florida statutes, *ante*, undertakes to designate as agents certain persons who in fact act for an insurance company in some particular; but it does not fix the scope of their authority as between the company and third persons and certainly does not raise special agents with limited authority into general ones possessing unlimited power. We assume Hogue, Torrey and the medical examiners were in fact designated agents of the company with power to bind it within their apparent authority; and in such circumstances the statute does not affect their true relationship to the parties. See *Continental Ins. Co.* v. *Chamberlain*, 132 U. S. 304, 310; *New York Life Ins. Co.* v. *Russell*, 77 Fed. Rep. 94, 103; *Wood* v. *Firemen's Insurance Co.*, 126 Massachusetts, 316, 319; *John R. Davis Lumber Co.* v. *Hartford Fire Ins. Co.*, 95 Wisconsin, 226, 234–235.

The assured at the least consciously permitted an application containing material misrepresentations to be presented by subordinate agents to officers of the insurance company under circumstances which he knew negatived any probability that the actual facts would be revealed; and later he accepted policies which he must have understood were issued in reliance upon statements both false and material. He could claim nothing because of such information in the keeping of unfaithful subordinates. Moreover, the false representations accompanied and were essential parts of the policies finally accepted. He did not repudiate, and therefore adopted and approved, the

representations upon which they were based. Beyond doubt an applicant for insurance should exercise toward the company the same good faith which may be rightly demanded of it. The relationship demands fair dealing by both parties. *New York Life Ins. Co.* v. *Fletcher*, 117 U. S. 519, 529, 533, 534; *Assurance Co.* v. *Building Association*, 183 U. S. 308, 361; *U. S. Life Ins. Co.* v. *Smith*, 92 Fed. Rep. 503.

Considered with proper understanding of the law, there is no evidence to support a verdict against petitioner and the trial court should have directed one in its favor.

Judgment of the Circuit Court of Appeals is reversed and the cause remanded to the United States District Court, Northern District of Florida, for further proceedings in accordance with this opinion.

Reversed.

MR. JUSTICE PITNEY dissents.